

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAVID E. MILLS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	BENJAMIN C. MIZER, ESQ.	
7	On behalf of the Respondents	25
8	REBUTTAL ARGUMENT OF	
9	DAVID E. MILLS, ESQ.	
10	On behalf of the Petitioner	51
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 09-737, Ortiz v.
5 Jordan.

6 Mr. Mills?

7 ORAL ARGUMENT OF DAVID E. MILLS

8 ON BEHALF OF THE PETITIONER

9 MR. MILLS: Mr. Chief Justice, and may it
10 please the Court:

11 Denial of summary judgment is not reviewable
12 on appeal after trial, especially where the decision
13 depends on whether the evidence on the merits of the
14 claim is sufficient to cross the legal line for
15 liability. In this case --

16 CHIEF JUSTICE ROBERTS: I'm sorry to
17 interrupt so quickly, but that especially I take it -- I
18 take it as a concession that there's a difference
19 between claims for qualified immunity based on evidence
20 and claims that are based on law.

21 MR. MILLS: Well, there's a difference
22 between defenses that depend on the evidence at trial.
23 What I would say about qualified immunity is that to the
24 extent any court of appeals is going to enter judgment
25 based on qualified immunity, it needs to understand the

1 conduct of the officials in the case. And so you're
2 always talking about the evidence of that conduct.

3 JUSTICE KENNEDY: Well, of course there is
4 always -- there are always facts. There are often
5 disputed facts. But suppose the issue is whether or not
6 this right -- and maybe there are two rights here --
7 this right was clearly established. That is an issue of
8 law.

9 MR. MILLS: That is -- that is an issue of
10 law, Your Honor.

11 JUSTICE KENNEDY: And doesn't that fall
12 within the "except" clause that the Chief Justice was
13 talking to you about, which you haven't had much time to
14 fill out, I understand.

15 But -- well, if you're going to say -- and
16 it's really not whether the summary judgment is
17 appealed. That's a little bit -- it's whether or not
18 the issues resolved by the summary judgment motion are
19 appealable. As I read into your response or implied
20 from your response to what the Chief Justice said, maybe
21 sometimes the summary judgment motion, say on an issue
22 of law, is sufficient to preserve the issue.

23 MR. MILLS: Well, and that gets to what I
24 think is the heart of the split in the circuits and the
25 confusion, is that every circuit recognizes a very

1 general rule that where the evidence at trial moots that
2 at summary judgment we are not going to review the
3 summary judgment decision.

4 Now, a number of courts said: Well, wait a
5 second; there are summary judgment issues that don't
6 depend on the evidence. Those are typically called
7 questions of law, and Respondents point to a number of
8 good examples in their brief of defenses such as statute
9 of limitations, preemption, and the like, that indeed
10 very often don't depend at all on the evidence at trial.
11 The difference with qualified immunity is that qualified
12 immunity requires the court to look at the evidence of
13 the claim itself.

14 Now, statute of limitations, for example, is
15 actually quite different, because in statute of
16 limitations -- let's suppose Michelle Ortiz filed her
17 suit 20 years late. It would not matter at all how much
18 evidence she adduced of the Respondents' misconduct. It
19 would be barred by statute of limitations.

20 JUSTICE GINSBURG: So Mr. Mills, what then
21 is the difference? You point out, quite rightly,
22 summary judgment looks to what evidence there was and
23 the question for the Court is: What could the plaintiff
24 prove? When we get past trial, the issue becomes: What
25 has the plaintiff proved?

1 So what was brought out at trial? What was
2 the record at trial that was larger than the record at
3 summary judgment? Because if there was no -- no new
4 fact presentation, no more ample fact presentation, then
5 it wouldn't matter. It would be the same body of
6 evidence, right?

7 MR. MILLS: Well, I think that's largely --
8 largely right, Justice Ginsburg, and here's an example
9 of what did change in this case.

10 At the summary judgment stage, what we had
11 were affidavits of the Respondents discussing their role
12 in relation to this case, with no comment whatsoever
13 about what the consequences would have been had
14 Ms. Jordan immediately reported the first sexual
15 assault. The record was bare at summary judgment from
16 Respondents' perspective on that point.

17 At trial, under cross-examination Ms. Bright
18 testified that Respondent Jordan indeed violated prison
19 policy by not reporting it and then, very crucially,
20 also agreed that the second, more violent assault would
21 have actually been precluded had that report taken
22 place.

23 Now, that's --

24 JUSTICE ALITO: This gets to what troubles
25 me about this case. Although the Sixth Circuit referred

1 to summary judgment in its opinion, it seems to me the
2 Sixth Circuit actually reviewed the evidence at trial
3 and determined that the defendants were entitled to
4 judgment as a matter of law based on the evidence at
5 trial.

6 So I don't know why this case actually
7 presents the question on which cert was granted. It
8 seems to me it presents a question of -- a purely
9 factual question in the end, whether there was --
10 whether judgment as a matter of law was appropriate.
11 And you never raised the judgment as a matter of law.

12 You never raised in the court of appeals, as
13 I understand it, the argument that the defendants'
14 ability to object to the entry of judgment as a matter
15 of law was waived because they never filed the
16 Rule 50(b) motion. Isn't that right?

17 MR. MILLS: Well, there's a couple points in
18 there that I need to address.

19 First, I think that you are exactly right.
20 What the Sixth Circuit did here is it reviewed a summary
21 judgment decision, but it did peek ahead to the trial
22 evidence, and it said it was doing that. I think that
23 highlights the fundamental problem of reviewing summary
24 judgment after the trial. The Sixth Circuit is
25 implicitly recognizing it would be illogical to look at

1 that summary judgment record, those affidavits, and then
2 ignore this cross-examined testimony --

3 JUSTICE ALITO: Well, suppose we were to
4 hold that they couldn't review the denial of summary
5 judgment. The case is remanded to them and they say:
6 Okay, well, we made a slip of the pen when we referred
7 to summary judgment in the prior decision. We really
8 were saying that the defendants were entitled to
9 judgment as a matter of law and, although there wasn't a
10 Rule 50(b) motion, that was waived because it wasn't
11 raised on appeal. So we are -- we come back to exactly
12 where we are now. All we have done is to correct a slip
13 of the -- what was arguably a slip of the pen, perhaps
14 motivated by their belief that the Rule 50(b) issue is
15 jurisdictional. But it really is not under our cases
16 distinguishing between jurisdictional questions and
17 claims processing questions.

18 MR. MILLS: And I agree with that last
19 point. But here's the problem and here's why it isn't
20 just simply a slip of the pen that can be fixed by
21 remanding. Even if this was not summary judgment
22 whatsoever and it was, as Respondents say, essentially a
23 Rule 50(a) review, that conflicts with an entire line of
24 this Court's decisions leading into Unitherm which makes
25 clear that the court of appeals absolutely lacks the

1 power to review the sufficiency of the evidence where
2 that question wasn't ruled upon by the district court.
3 And so the court of appeals here, regardless of any sort
4 of forfeiture argument, absolutely lacked the power to
5 consider it.

6 The additional point about your --

7 JUSTICE SCALIA: But that's not the point
8 that you have made here, I mean, and that is not the
9 point on which we granted certiorari.

10 MR. MILLS: That's right and I think -- I
11 think what I just said about the 50(b) point is that I
12 think it highlights that this really was a summary
13 judgment review by the Sixth Circuit.

14 JUSTICE KAGAN: Mr. Mills, if I could just
15 understand your answer to Justice Alito. You concede
16 that the Sixth Circuit opinion is using the record built
17 on the whole trial and that that's a different record
18 from the record that existed at summary judgment; is
19 that correct?

20 MR. MILLS: I do concede it, except to the
21 extent that I concede they did an adequate review of the
22 record. But I concede that point. For example --

23 JUSTICE KAGAN: So they have that first
24 paragraph where they suggest that they're ruling on a
25 summary judgment motion. Then they go through an entire

1 opinion that talks about the facts and the record. And
2 there are very few citations, but your understanding is
3 that when they talk about the facts in the record they
4 are talking about the post-trial, I mean the record that
5 has been built up as a result of the trial?

6 MR. MILLS: There are certainly a number of
7 instances where they are talking about the trial. I do
8 think it is even muddy the extent to which they are
9 incorporating trial facts with summary judgment facts.
10 The example I gave about this point where Mrs. Bright
11 conceded on cross that Ms. Ortiz indeed would have been
12 separated and the assault, second assault, precluded,
13 it's one of two things. Either the Sixth Circuit's
14 reviewing summary judgment and picking a couple of trial
15 facts it thinks helps to review and missing the facts;
16 or it's doing -- it's looking ahead at these trial facts
17 and because -- particularly because the district court
18 never weighed in on that, on a Rule 50(b), it's botching
19 the record. And it goes to the heart of this Court's
20 cases from Cone v. West Virginia Pulp & Paper in 1947 up
21 through Unitherm, which says we have to have the
22 district court review the sufficiency of the evidence
23 before the court of appeals could even have the power to
24 possibly consider this.

25 JUSTICE SOTOMAYOR: That answer is not

1 addressing Justice Alito's point, which he said a Rule
2 50 motion is not jurisdictional. You are in essence
3 claiming it is. You are saying they lacked the power,
4 but Justice Alito's question to you said they don't,
5 that they've misread the fact that this is not a
6 jurisdictional motion. So address that question: Why
7 is it jurisdictional as opposed to a claim processing?

8 MR. MILLS: Your Honor, I am not disputing
9 that the Sixth Circuit had jurisdiction to consider the
10 case. But I am making a distinction among jurisdiction
11 and power, and it's the same distinction actually the
12 Tenth Circuit employed in a case called Williams v.
13 Gonterman, which is cited in our reply brief, I think
14 it's at page 10. But the exact issue came up, where the
15 verdict loser said: Wait a second; this issue's been
16 forfeited. The Tenth Circuit, reading Unitherm, reading
17 the debate between the majority and the dissenters, who
18 said plain error and those doctrines should apply, said:
19 We lack the power to review this; we have jurisdiction,
20 but we lack the power.

21 JUSTICE SOTOMAYOR: In claim processing
22 rules we have said that, unless you object, the court
23 doesn't lack power. Since you didn't object below to a
24 argument that Rule 50(b) precluded consideration by the
25 court of appeals, why wasn't that argument waived before

1 the court?

2 MR. MILLS: It's not waived because, while
3 the general principle is that claims processing rules
4 are indeed subject to waiver and forfeiture, in this
5 particular context, as this Court has made clear, that
6 the word "power" is not an accidental use. It's been
7 used in all these cases.

8 JUSTICE GINSBURG: Why is it -- power --
9 jurisdiction is power, power to proceed in a case. But
10 we are in an area where there are many, many cases of
11 this Court that distinguish the Rule 50(a), 50(b) from
12 the run-of-the-mine claim processing rule because in the
13 background is the Seventh Amendment re-examination
14 clause. That's the whole reason why there is this
15 50(a)-50(b) litany, why the verdict loser must repeat
16 the 50(a) motion, after the verdict.

17 So I'm surprised that you're using the word
18 "power" and you're not referring to any of that history
19 which stems from a constitutional provision, the Seventh
20 Amendment.

21 MR. MILLS: Well, Justice Ginsburg, you are
22 absolutely correct and I think that footnote 4 of
23 Unitherm goes right to your point. In footnote 4 of
24 Unitherm, the Court explains that the very reason a
25 court of appeals lacks the power, lacks the power to

1 review that question, is because it is essentially, as
2 in Unitherm, going to be as a court of appeals reviewing
3 the conduct -- the sufficiency of the evidence, without
4 a district court ruling on the question. And this Court
5 said in Unitherm that that raises serious Seventh
6 Amendment concerns. This case is actually a very good
7 example --

8 JUSTICE ALITO: Mr. Mills, I got you started
9 on this, but none of this is the question on which we
10 granted review, is it? We didn't grant review to decide
11 whether a court of appeals can consider judgment as a
12 matter of law where there isn't a 50(b) motion and no
13 argument is made that the -- that issue was waived by
14 failing to make the motion. We didn't grant review on
15 that.

16 MR. MILLS: Justice Alito, that highlights
17 another important point about this exchange, and that is
18 that Respondents in the Sixth Circuit did not suggest
19 that the Sixth Circuit did have the authority to take
20 the summary judgment question and then look ahead to
21 trial facts. And so, the Sixth Circuit has taken the
22 summary judgment decision and then acted without
23 authority to look ahead at the trial facts. And so if
24 the argument is that we have forfeited a preemptive
25 argument to the Sixth Circuit that it couldn't do this

1 frankly very unorthodox approach, I don't think that
2 that's a proper invocation of forfeiture even regardless
3 of the point about power.

4 JUSTICE GINSBURG: Are you saying then that
5 if we explain to the Fifth Circuit -- to the Sixth
6 Circuit, that the record they must look at is the trial
7 record, so it's different from the summary judgment
8 stage, if we told them that then maybe they would look
9 at the evidence differently, even though they purported
10 to look at the trial evidence?

11 MR. MILLS: Well, I think if that order were
12 given they would indeed do that. But I would still come
13 back to the point that there is absolutely no basis on
14 which they would have the authority to do that. And the
15 point is in the Unitherm line of cases that if you don't
16 have a district court ruling on the very question, the
17 question here of whether their conduct, as they say
18 crossed, the constitutional line, you're circumventing
19 the district court's role in the entire process.

20 As this Court's explained repeatedly, a
21 requisite of a court of appeals reviewing that evidence
22 that went to the jury is that the district court first,
23 who has the feel of the case, who saw the witnesses, who
24 saw Respondent Bright on cross-examination, first have
25 the opportunity in the judge's discretion to grant a new

1 trial.

2 JUSTICE GINSBURG: So if you're right, then
3 there has to be a remand to the Sixth Circuit with
4 instructions to send the case back to the district court
5 to ask the district court whether it thought the
6 evidence was sufficient?

7 MR. MILLS: I don't think so, Your Honor. I
8 think that the best way to see this case is it's indeed
9 a review of the summary judgment decision. That's the
10 only decision by the district court that had to do with
11 qualified immunity.

12 The Sixth Circuit expressly invoked an
13 exception to say, we can review summary judgment after
14 the trial because its qualified immunity and the Eighth
15 Circuit said that's okay and we say that's okay, we are
16 looking ahead at trial facts. And I think what this
17 Court can and should conclude is that it's improper to
18 review the summary judgment decision after trial because
19 the facts have changed.

20 JUSTICE ALITO: And your argument is that
21 where the district court denies summary judgment on a
22 qualified immunity issue that is based even purely on an
23 issue of law, there can't be a review unless that's
24 renewed -- there can't be appellate review unless that
25 purely legal question is renewed in the Rule 50(b)

1 motion. That's your argument?

2 MR. MILLS: That is my argument, with a
3 couple key pieces -- first of all, they could of course
4 take a collateral order appeal. But if they proceed to
5 trial -- and here's -- here's sort of the fundamental
6 point about qualified immunity. Sure, there are purely
7 legal questions in the qualified immunity inquiry. Was
8 the right clearly established? But to enter judgment,
9 to enter judgment, whether it's the district court or
10 the court of appeals, that court must know what the
11 conduct is.

12 JUSTICE ALITO: But what if the facts are
13 utterly undisputed? There is a videotape of exactly
14 what went on. Nobody has the slightest disagreement
15 about the facts. The only question is whether the right
16 was clearly established, and the district court rejects
17 that at summary judgment. What benefit -- what is the
18 point of saying that the defendants have to raise that
19 same issue again in the Rule 50(b) motion? It's utterly
20 a -- a pointless exercise.

21 MR. MILLS: Well, it's certainly a less
22 compelling case than this one where the facts indeed
23 change. But I would say that there -- it's not utterly
24 pointless because the 50(b) motion still invokes all the
25 protections that this Court has described where the

1 district court, who had the feel of the case, gets the
2 first chance to consider whether a new trial should be
3 granted.

4 JUSTICE KAGAN: Mr. Mills, when -- when
5 Unitherm talks about the district court feeling the case
6 and having a feel for the case, it's talking about
7 having a feel for the evidence and for the facts. The
8 whole rationale of Unitherm is based on the evidence,
9 the facts, not on purely legal questions. So suppose we
10 disagree with you about the reach of Unitherm. Suppose
11 we say Unitherm doesn't have any application to purely
12 legal questions.

13 What would that mean for your case? Which
14 part of your claims were purely legal and which part
15 were instead founded on the facts, in which case you
16 would have a better Unitherm argument?

17 MR. MILLS: It -- it would still mean you
18 would have to reverse in this case, and I think in
19 Justice Alito's hypothetical perhaps, perhaps not.

20 But in this case, as -- as Respondents
21 themselves say, the question here is actually very
22 simple. It's whether their conduct crossed a
23 constitutional line. And the point is that, even in the
24 qualified immunity inquiry, the question is does the
25 conduct -- and that's conduct in one way at summary

1 judgment and another way at trial -- does that conduct
2 cross a clearly established constitutional line.

3 CHIEF JUSTICE ROBERTS: I don't understand,
4 counsel, how your argument that in every case you need
5 to know the facts, every qualified immunity case you
6 need to know the facts, and those only come out at
7 trial -- is consistent with our recognizing that you can
8 have a collateral order appeal of denial of summary
9 judgment. In other words, you can consider qualified
10 immunity without knowing how the facts are going to come
11 out at trial, which is why we allow you to have an
12 appeal before trial.

13 MR. MILLS: You are absolutely right. And
14 at summary judgment officers are entitled to invoke
15 immunity and they are entitled to take that immediate
16 appeal, and it's typically -- well, required under
17 Johnson v. Jones that it be what this Court's called a
18 question of law. The defendants assume the facts
19 against them and they say to the court of appeals, it
20 may be a purely legal question, like this isn't clear --
21 this is clearly established, or isn't clearly
22 established. But to -- to say whether that line is
23 crossed, I mean, as recently as Iqbal this Court's --

24 CHIEF JUSTICE ROBERTS: Well, so you are
25 just saying your case on qualified immunity isn't like

1 that case; Is that all?

2 MR. MILLS: Well, I'm saying it -- it's like
3 that case to the extent that the court still has to
4 understand, if it's going to enter judgment, what the
5 conduct was. Even if it's looking at purely --

6 JUSTICE SCALIA: No, it doesn't -- doesn't
7 have to know what it was. It assumes it to be what --
8 what the plaintiff claims it was.

9 MR. MILLS: That's right.

10 JUSTICE SCALIA: At the summary judgment,
11 you give the benefit of the doubt to the plaintiff.

12 MR. MILLS: That's right.

13 JUSTICE SCALIA: So there is always a
14 factual element to the -- to the ruling.

15 MR. MILLS: That's right. And I -- I think
16 that bolsters my point. There is always a factual
17 element to the ruling. And so when you go to trial and
18 you put on a trial that is all about Respondents'
19 conduct, and you have them under cross-examination and
20 that evidence grows of their misconduct, then we are
21 talking about a situation where they --

22 JUSTICE SCALIA: It's never going to be any
23 better than what you assumed. It's never going to be
24 any better for the plaintiff than what you assumed at
25 the summary judgment stage.

1 MR. MILLS: Your Honor, it actually was in
2 this case.

3 JUSTICE SCALIA: For -- for --

4 MR. MILLS: It actually was better at trial
5 in this case for the plaintiff.

6 JUSTICE SCALIA: Why was that?

7 MR. MILLS: It was -- one example I gave
8 earlier: Ms. Ortiz before trial didn't have knowledge
9 of what would have happened had Mrs. Jordan not violated
10 prison procedures and immediately reported the first
11 assault. On cross-examination, however, Mrs. Bright at
12 page 242 of the trial transcript said: "The second
13 assault, the violent assault, would have been
14 precluded."

15 Now, it seems to me, again reading the cold
16 transcript --

17 JUSTICE SOTOMAYOR: It just -- just finish:
18 Because if Ms. Jordan had reported the incident that she
19 was required to, they would have put Ms. Ortiz in
20 segregation automatically; is that it?

21 MR. MILLS: Not that they would have put her
22 in segregation, but that they would have taken steps to
23 separate her from the officer, whether that meant
24 removing the officer from the location or putting her in
25 another cell. The important piece of that is not only

1 did it change from summary judgment to trial; the Sixth
2 Circuit got it entirely wrong.

3 CHIEF JUSTICE ROBERTS: But you have an
4 obligation in opposing summary judgment to, in your list
5 of disputed facts or facts that preclude summary
6 judgment, to put all that in. And why didn't you put
7 the point you are raising now in the opposition to
8 summary judgment?

9 MR. MILLS: That is not something Ms. Ortiz
10 would have knowledge of.

11 CHIEF JUSTICE ROBERTS: I know. So it --

12 JUSTICE GINSBURG: But you -- you prevailed
13 on the summary judgment motion. There was a summary
14 judgment motion, right? And it was denied.

15 MR. MILLS: That's right. That's right.

16 JUSTICE GINSBURG: So the -- we know that
17 the district judge thought that at that point there was
18 a case to be presented for trial based on the
19 plaintiff's allegations.

20 MR. MILLS: That's absolutely right. And --

21 CHIEF JUSTICE ROBERTS: Well, but -- but you
22 may prevail. You may have three different factual
23 disputes that the other side is saying are undisputed,
24 and the fact that you prevail on one doesn't mean that
25 you didn't have an obligation to put in your opposition

1 the others.

2 MR. MILLS: Well, Your Honor, I -- I just
3 can't see how Ms. Ortiz would have an obligation to put
4 in some fact that is outside of her knowledge and,
5 frankly, something that came out when a Respondent caved
6 in a bit on cross-examination.

7 JUSTICE BREYER: How would you put the rule
8 about when you have to renew a motion? You move for
9 summary judgment. Can you say this? You've looked up
10 the treatises and so forth. If the motion for summary
11 judgment involves either a question of fact or a mixed
12 question of fact and law, it has to be renewed. If it
13 involves neither of the others, neither of those two
14 things, but it's a pure question of law and not mixed,
15 it doesn't have to be renewed?

16 MR. MILLS: I think that -- that's a fair
17 way to state it.

18 JUSTICE BREYER: Is there any authority for
19 that? I mean, is there any -- it seems to be roughly
20 what you are trying to argue, roughly. At least it
21 seems to me a rule that would make sense. Is it -- what
22 do you find related to that? It seems to me that must
23 have been thought about before this minute.

24 MR. MILLS: Well --

25 JUSTICE BREYER: Not necessarily by you, but

1 by somebody.

2 MR. MILLS: Yes, indeed. I think it has
3 been thought about. I think it's been thought about
4 really by every circuit, when they recognize the very
5 basic principle that the real evidence of the case is
6 the evidence at the trial, and what that means is that
7 if the evidence at the trial goes to the question at
8 summary judgment, whatever that legal issue may be, it
9 is illogical to ignore exactly what happened at trial
10 and go back to summary judgment.

11 JUSTICE BREYER: No, but -- let -- let's
12 imagine it has nothing to do with qualified immunity.

13 MR. MILLS: Yes.

14 JUSTICE BREYER: A bread and butter case.

15 MR. MILLS: Yes.

16 JUSTICE BREYER: You can't appeal a denial
17 of motion for summary judgment. But there is a trial
18 and the lawyer forgets to renew the motion. Sometimes
19 he's lost it; I guess sometimes he hasn't. I would
20 think he would have lost it if it's a mixed question of
21 fact or law or if it's a pure question of fact that the
22 answer turns on. I would think he hadn't lost it if in
23 fact it is a pure question of law. But is that the
24 basic hornbook rule out of this context?

25 MR. MILLS: Yes, I think it is. I think it

1 is the basic horn rule --

2 JUSTICE KAGAN: And Mr. Mills, if that were
3 the basic hornbook rule, your claims are all matters of
4 fact or mixed questions of fact and law?

5 MR. MILLS: Our claims are mixed questions
6 of fact and law, yes.

7 JUSTICE KAGAN: There are no legal issues?

8 MR. MILLS: There are purely components to
9 those inquiries; there is no doubt about it. Again, a
10 purely legal question might be what is the
11 constitutional right; is it clearly established.

12 JUSTICE KAGAN: Well, that's what I'm
13 asking. I'm asking is -- is -- are the questions that
14 you have those sorts of questions, or are they factual
15 inquiries that would fall on the other side of
16 Justice Breyer's line?

17 MR. MILLS: At the end of the day these are
18 factual inquiries in which you have to understand the
19 officer's conduct. All I'm saying is that the second
20 component to establish immunity or anything else does
21 include always a pure question about whether the right's
22 clearly established. But there is no doubt that to
23 assess whether that line has been crossed you have to
24 understand what the facts are.

25 JUSTICE ALITO: The -- determining what is a

1 mixed question is notoriously difficult. What about the
2 -- the situation where the -- the ruling is, assuming
3 certain facts to be true, the -- the right was not
4 clearly established? Now, is the fact that certain
5 facts are assumed to be true enough to make that a mixed
6 question?

7 MR. MILLS: Yes, it is, because that's a
8 classic sufficiency challenge at Rule 50, to assume
9 the -- that's what Rule 50 requires. Assume the facts
10 against you after the verdict's come back and now say,
11 you know, what, Your Honor, it was insufficient.

12 I would like to reserve my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Mizer.

15 ORAL ARGUMENT OF BENJAMIN C. MIZER

16 ON BEHALF OF THE RESPONDENTS

17 MR. MIZER: Mr. Chief Justice, and may it
18 please the Court:

19 As I think the discussion has already
20 demonstrated, Ms. Ortiz's question presented hinges on a
21 false assumption. That assumption is that the Sixth
22 Circuit was reviewing the summary judgment order as the
23 final appealable order in this case.

24 JUSTICE KENNEDY: Except that it begins,
25 2(a), "Although courts normally do not review the denial

1 of a summary judgment motion after trial on the merits,
2 the denial of summary judgment based on qualified
3 immunity is an exception to this rule." That's the
4 opening. That sets the stage for what follows.

5 And it may be that everybody, including the
6 Sixth Circuit, misapprehended the rule because there are
7 some cases that depend on AN assessment of the record
8 and some cases that don't, but that's not what the Sixth
9 Circuit said.

10 MR. MIZER: I think that the Sixth Circuit's
11 word choice in the sentence that you just read was not
12 perfectly clear.

13 JUSTICE KAGAN: Well, Mr. Mizer, you asked
14 for an appeal of the summary judgment motion, so they
15 might have chosen their words based on your request.

16 MR. MIZER: Actually, Your Honor, the
17 summary judgment motion was only one of several orders
18 listed in the notice of appeal. And the Sixth Circuit
19 brief was couched as an appeal from the verdict, which
20 at the bottom of the prior page of the petition
21 appendix, from where Justice Kennedy just read, the
22 bottom of page 7a, the Sixth Circuit calls it an "appeal
23 from the jury verdict."

24 And then the Sixth Circuit at petition
25 appendix 2a and throughout its opinion refers to "trial

1 evidence."

2 JUSTICE GINSBURG: But, Mr. Mizer, then you
3 must concede that this opening sentence that
4 Justice Kennedy just quoted is wrong. Courts normally
5 don't review the denial of summary judgment motion after
6 trial on the merits, but when the summary judgment
7 denial is based on qualified immunity, there's an
8 exception.

9 MR. MIZER: I think that what the Sixth
10 Circuit meant there was that the issue of qualified
11 immunity raised in summary judgment was preserved. I
12 don't think its word choice was perfectly clear, but I
13 think other phrases in the Sixth Circuit's opinion make
14 clearer that what it was doing was viewing the full
15 trial record.

16 JUSTICE SOTOMAYOR: So that we should -- I
17 think what that means to me is that you really ignore
18 whether it was raised at summary judgment. If you are
19 going to look at the evidence at trial, what do we look
20 at, at trial, to see that the claim of qualified
21 immunity was preserved? Because it's a little illogical
22 to say you're reviewing the summary judgment record when
23 you're not.

24 MR. MIZER: Well, and I don't think the
25 Sixth Circuit was saying it was reviewing the summary

1 judgment record, and that would have been not
2 appropriate. What it was doing was looking at the whole
3 record. And a legal issue doesn't have to be raised
4 post-trial in order for it to have been adequately --

5 JUSTICE BREYER: But surely it has to be
6 raised post-trial if your legal argument is: Look at
7 the facts; the facts of this case as proved do not
8 support liability.

9 I mean, I would have thought that was a
10 classic instance where you do have to make the motion.
11 That's the whole point of having to renew it.

12 MR. MIZER: To the extent --

13 JUSTICE BREYER: Am I wrong?

14 MR. MIZER: Partly, yes, Your Honor. To the
15 extent the argument is that there needed to be a 50(b)
16 motion --

17 JUSTICE BREYER: Why not? I mean, do you
18 normally -- forget this case. What the lawyer says is:
19 Judge, they are never going to be able to prove that my
20 client crossed the intersection. Okay, we go to trial.
21 At trial, he wants to say: We heard all the evidence
22 now and it doesn't show my client crossed the
23 intersection, so not liable. Okay?

24 Doesn't he have to renew it?

25 MR. MIZER: In your hypothetical?

1 JUSTICE BREYER: Yes.

2 MR. MIZER: Yes.

3 JUSTICE BREYER: Okay. Fine. Now, how is
4 yours one bit different? Because what you're saying is
5 that the evidence, when you look at it, will show the
6 facts are such that there must have been qualified
7 immunity under the law.

8 MR. MIZER: The difference, Your Honor, is
9 that this Court's case law concerning -- the Mitchell
10 line of cases concerning collateral order appeals in the
11 qualified immunity context divides qualified immunity
12 claims into two halves.

13 There are evidentiary sufficiency-based
14 qualified immunity claims, and there are legal claims.

15 CHIEF JUSTICE ROBERTS: Yes, that is right,
16 and I find that in the context where that already
17 matters, whether they are appealable as a collateral
18 issue, already very difficult and complicated to sort
19 out. Now, what you want us to do is take that
20 difficulty and continue it on in terms of when you can
21 appeal and when you can't.

22 Some qualified immunity claims are purely
23 legal. Some are purely factual. Some are in the
24 middle. Wouldn't it be easier if we just said: Here's
25 the rule from now on, you've got to renew them all in a

1 50(b) motion and that makes it a lot easier for the
2 trial courts and the appellate courts to figure out when
3 they have to -- when they can consider it and when they
4 can't.

5 I understand your argument that it makes a
6 difference. I think it's a good argument, because some
7 don't depend on the facts. But going forward it just
8 creates an awful lot of difficulty that we don't need to
9 buy into.

10 MR. MIZER: Well, first of all, I think that
11 because it is a difficult question, it should have been
12 raised by Ms. Ortiz properly, and she hasn't raised a
13 50(b) argument properly. But even if the Court were to
14 reach it, I think the clearer rule is to map the Johnson
15 line onto the sufficiency of the evidence line for 50(b)
16 motions. Otherwise --

17 JUSTICE SCALIA: The Johnson line isn't much
18 of a map, is what the Chief Justice is suggesting. It's
19 a mess. It's very hard to sort those things out. Why
20 should we double the difficulty by -- by bringing it in
21 at the Rule 50(b) stage as well?

22 MR. MIZER: Because the converse rule, Your
23 Honor, would create even more difficulties. On
24 Ms. Ortiz's --

25 JUSTICE SCALIA: Why? All you have to do --

1 any lawyer going in knows he has to make the motion at
2 the close of the evidence. What's the big deal?

3 JUSTICE GINSBURG: And in fact, you did.
4 You did move under 50(a). This whole case is here
5 because apparently -- well, what reason was it that you
6 didn't make the 50(b) motion? You told the court under
7 50(a), after all the evidence was in but before the case
8 went to the jury, that the jury would not have a legally
9 sufficient evidentiary basis to find for Ms. Ortiz.
10 That was -- that was your motion.

11 You were saying: Court, there was no
12 legally sufficient evidentiary basis. Evidentiary
13 basis. That was the motion that you made, recognizing
14 that the judgment, the question is whether there is a
15 sufficient evidentiary basis.

16 MR. MIZER: And that argument is a different
17 species of argument than the argument on which -- than
18 the reasoning on which the Sixth Circuit resolved the
19 case, which is, even assuming all the facts as given by
20 Ms. Ortiz and taking, treating those facts as
21 uncontroverted, still there was not a violation of
22 clearly established law.

23 And under Johnson v. Jones and Mitchell,
24 that is a different question than from the question of
25 whether or not particular conduct has been proven.

1 As --

2 JUSTICE GINSBURG: Then what you are saying
3 is you didn't even need to make the 50(a) motion, that
4 that was just an unnecessary touching base with Rule
5 50(a)? Is that what you are saying?

6 MR. MIZER: That is our position, yes, Your
7 Honor, because a legal issue is adequately preserved
8 once it's pressed and passed on in the district court.
9 And to move for summary judgment on the issue is enough
10 to preserve a legal claim, the legal claim being not
11 that particular -- that sufficient evidence exists to
12 prove that particular conduct occurred, but rather that
13 the -- given all of that, that claim as assumed, still,
14 the Harlow line of objective legal reasonableness has
15 not been crossed.

16 JUSTICE KENNEDY: I suppose there are some
17 cases in which the failure of the court to give a
18 requested instruction preserves the issue, and perhaps
19 50(b) is not required there.

20 Were there any instructions proffered and
21 denied in this case that would have preserved the issue
22 for appeal?

23 MR. MIZER: There was a requested
24 instruction regarding qualified immunity, yes, and it
25 was not given. We are not arguing that that --

1 JUSTICE SOTOMAYOR: What was that
2 instruction?

3 MR. MIZER: The instruction was about the
4 objective legal reasonableness standard under Harlow. I
5 actually don't think that that request was proper --

6 JUSTICE SOTOMAYOR: Do you have a cite to
7 the record?

8 MR. MIZER: I don't have a cite to the
9 record at the moment. But the point is that actually,
10 that instruction wasn't proper, because the jury doesn't
11 resolve the Harlow objective legal reasonableness
12 question. Instead, the jury resolves the disputed
13 facts, and then the court takes those facts as a given
14 for purposes of the Harlow question.

15 And in this case, I think there is an
16 example of this distinction. There was very much
17 disputed at trial the question of whether Ms. Ortiz told
18 Ms. Jordan the name of the guard who had assaulted her.
19 And that fact was disputed at trial. We didn't move for
20 50(b) over that factual dispute and so we couldn't
21 appeal on that question.

22 But what we did appeal was that, taking that
23 fact as assumed for purposes of the qualified immunity
24 question, still qualified immunity was warranted.

25 JUSTICE GINSBURG: Could you explain to me

1 what -- you made a 50(a) motion. Why did you -- was
2 there a reason for making the 50(a) motion and not
3 following it up with a 50(b) motion?

4 MR. MIZER: I'm not aware of a reason, Your
5 Honor. But at pages 4 to 5 of the joint appendix, I
6 think it is clear that there were two different types of
7 arguments being made at the 50(a) stage. One argument
8 was the dispute over facts. The other argument was,
9 even if we don't dispute those facts, still Ms. Ortiz's
10 arguments haven't shown a constitutional violation.

11 JUSTICE SOTOMAYOR: How -- could you --

12 JUSTICE GINSBURG: It's very clear from Rule
13 50 that 50(a) and 50(b) go together, and the
14 explanation, as I indicated when Petitioner's counsel
15 was speaking, is the re-examination clause of the
16 Seventh Amendment. So I think every first year
17 Procedure student learns 50(a), 50(b) go together, and
18 there is an historic reason why you must back up a 50(a)
19 motion with a 50(b) motion. They're not -- they all --
20 they all ask the same question. The Rule 56, the Rule
21 50, 50(b), they all ask: Is there sufficient evidence
22 to warrant a jury finding, whatever. They all ask that,
23 but they ask -- ask it on the basis of a different
24 record: the summary judgment record, the trial record,
25 and the jury verdict.

1 MR. MIZER: But still, Your Honor, I think
2 the question of whether particular conduct has been
3 proven is a sufficiency question, and that differs in
4 nature from the question of whether, taking that proven
5 conduct as a given, assuming it to be true, without --
6 without questioning the correctness of the plaintiffs'
7 version of the facts, that the -- then the Harlow
8 question is a separate question.

9 JUSTICE GINSBURG: Do you know of any case
10 holding that you don't have to couple a 50(a) motion
11 with a 50(b) motion depending upon what's in your 50(a)
12 motion?

13 MR. MIZER: I'm not aware of any case, no,
14 although I am aware of cases including the K & T
15 Enterprises case from the Seventh -- or sorry, from the
16 Sixth Circuit, that we cite in our brief, which says
17 that legal claims, purely legal claims may be raised in
18 judgment as a matter of law motions under either 50(a)
19 or 50(b), but that 50(b) is not required with respect to
20 those motions.

21 And so -- so the 50(a) motion here was a
22 belts and -- belt and suspenders effort, but it wasn't
23 legally required because of the -- the --

24 JUSTICE SOTOMAYOR: Could -- could you
25 articulate for me the line that you see between assuming

1 all of the facts and it's not enough as a matter of law,
2 and a sufficiency claim. And let's break out the two
3 claims: one against Ms. Jordan, one against Ms. Bright.

4 On the due process claim against Ms. Bright
5 there are two prongs I think to your argument. One is
6 that as a matter of law under Sandin putting her in
7 solitary confinement did not violate any -- any
8 constitutional right. And then there's "she didn't
9 retaliate" part of your claim.

10 The two seemed mixed up to me below. And I
11 thought in reading your submissions to the district
12 court you were saying that if she retaliated in putting
13 her in segregated confinement, it doesn't matter whether
14 there is a Sandin violation or not; she couldn't do the
15 retaliatory act; is that correct?

16 MR. MIZER: The -- the Sixth Circuit held in
17 this case that the retaliation claim is a different
18 claim from the due process claim, that it would be based
19 on --

20 JUSTICE SOTOMAYOR: The First Amendment.

21 MR. MIZER: -- the First Amendment or some
22 other amendment. And --

23 JUSTICE SOTOMAYOR: I'm trying to separate
24 out your --

25 MR. MIZER: Yes.

1 JUSTICE SOTOMAYOR: -- your argument,
2 however. What is your -- what is your position on this
3 question?

4 MR. MIZER: Our position is that the Sixth
5 Circuit got it right, and Ms. Ortiz hasn't appealed to
6 this Court on that holding, that as a -- as a matter of
7 law under Sandin, placing an individual in segregated
8 confinement does not amount to a due process violation
9 vis a vis the -- the ordinary conditions of prison
10 confinement.

11 I also have an answer, Justice Sotomayor, to
12 your question about the -- the jury instruction request.
13 It's in document 84 in the district court record.

14 JUSTICE GINSBURG: You -- you refer to
15 Sandin. There are some extra things about the
16 confinement here. She was shackled, she was ill, and
17 nobody attended to her.

18 MR. MIZER: The -- the medical treatment
19 claims were dismissed by the district court at summary
20 judgment because Ms. Bright did not participate and did
21 not have any knowledge of --

22 JUSTICE GINSBURG: Well, is -- on the
23 question of whether this treatment was punitive rather
24 than just protective custody.

25 MR. MIZER: And again, on the question of

1 punitiveness the Sixth Circuit held that that was not
2 preserved -- that claim was not preserved by Ms. Ortiz
3 and she has not petitioned to this Court for review of
4 that holding by the Sixth Circuit. And so the only
5 question is the square Sandin question of whether
6 segregated confinement is an atypical and significant
7 hardship vis a vis the routine conditions of -- of her
8 confinement.

9 JUSTICE GINSBURG: Well, wouldn't it be
10 this, the segregated confinement in this case, not at
11 large?

12 MR. MIZER: The -- again, the Sixth
13 Circuit's holding was that Sandin answered that -- that
14 question as a matter of clearly established law, and
15 since Ms. Ortiz hasn't petitioned for review on the
16 merits of that question, I'm not sure how it's presented
17 to this Court.

18 JUSTICE ALITO: Mr. Mizer, is it your
19 understanding that -- that Unitherm was based on Seventh
20 Amendment considerations, or was it based on prior
21 decisions that in turn were grounded on considerations
22 of fairness to the verdict-winner, namely the
23 opportunity when a motion for judgment as a matter of
24 law is made after the verdict to move for dismissal
25 without prejudice or move for a new trial?

1 MR. MIZER: I think Unitherm was more
2 squarely the latter, although the Court did refer to the
3 Seventh Amendment in responding to Justice Stevens'
4 dissent. And the Seventh Amendment concerns I don't
5 think are implicated here, because it is well
6 established that legal claims like qualified immunity
7 are not for the jury to resolve. And so taking --
8 taking the case away from --

9 JUSTICE GINSBURG: Well, then you are
10 saying, the category -- the mixed claims -- as
11 Justice Breyer proposed, if it's a purely legal claim,
12 then you're right. If it's a mixed claim, then you're
13 wrong.

14 MR. MIZER: And I think those -- those
15 categorization are -- are fairly slippery and would be
16 difficult to apply, as I think the Chief Justice
17 suggested. So the guidance that is clear is the
18 guidance that already exists from Johnson v. Jones,
19 which is that there are -- there two types of qualified
20 immunity claims and if you are assuming the facts to be
21 true as the plaintiff posits them, and you are not
22 controverting particular conduct, then you are in the
23 legal --

24 JUSTICE KAGAN: Well, Mr. Mizer --

25 JUSTICE KENNEDY: One way to make the

1 formulation work is to say whether or not the issue
2 depends on an assessment of the record.

3 MR. MIZER: Well, qualified immunity is
4 always going to be an application of clearly established
5 law through fact. And Mitchell notes that -- that there
6 will be some --

7 JUSTICE KENNEDY: Well, but we have been
8 through this. I think it was Justice Alito gave the
9 hypothetical, suppose everybody agreed on what happened,
10 the question is whether or not the right's clearly
11 established.

12 MR. MIZER: And that is --

13 JUSTICE KENNEDY: That's a pure issue of
14 law.

15 MR. MIZER: And as this Court has called it,
16 that is correct and that is this case.

17 JUSTICE SOTOMAYOR: How is that --

18 JUSTICE KAGAN: Is it this case, Mr. Mizer?
19 Take the deliberate indifference claim. The question is
20 whether the conduct amounted to deliberate indifference.
21 Why is that any different from asking whether a
22 particular kind of conduct amounted to negligence, which
23 in a previous case this Court said you had did have to
24 make 50(b), a 50(b) motion in order to preserve. That
25 was in the Johnson v. New York case.

1 MR. MIZER: It's different, Your Honor,
2 because the -- the prong of the analysis in the
3 deliberate indifference conduct that the Sixth Circuit
4 was looking at was the objective prong of whether or not
5 the response was reasonable. So assuming all of the
6 worst of -- of Ms. Jordan's intent, as proven by the
7 trial record, and assuming the worst of what she did or
8 didn't do, still her response was as a legal matter
9 objectively reasonable, and that was the Sixth Circuit's
10 holding.

11 And so therefore, because that's a legal
12 inquiry, there was no 50(b) requirement even if Ms.
13 Ortiz had preserved the 50(b) argument.

14 The -- the -- Ms. Ortiz has also posited
15 that a collateral order appeal is a requirement in order
16 to preserve a qualified immunity claim. That argument
17 is clearly foreclosed not only by the broad agreement
18 among the circuits, but also this Court's decisions in
19 United States v. --

20 JUSTICE BREYER: Okay. When you go back --
21 you are the one who read these cases pretty thoroughly,
22 and as I looked at it, I -- with the incomplete
23 knowledge, I would have thought that Justice Ginsburg's
24 statement of it is basically right. What Rule 50 is
25 about is sufficiency of the evidence. And 50(a)

1 involves, we are saying it won't be sufficient. And
2 50(b) involves it wasn't sufficient. Then you could
3 have the Chief Justice's rule. It would work perfectly.

4 But apparently there is a Second Circuit
5 case and some things in the treatises that says
6 sometimes Rule 50(a) is being used for some other
7 purpose; and that's what seems to be going wrong. Like
8 if you have a pure question of law, you ought to be
9 outside 50(a). You ought to be doing some other thing
10 in, you know, a question like: Was there collateral
11 estoppel? That means that he couldn't say he was a
12 policeman, because they litigated this four months ago.
13 It's a pure question of law.

14 So what are these cases and that exception
15 in the treatise about? What are they thinking of? What
16 kinds of instances do they think come under 50(a) that
17 aren't sufficiency of the evidence?

18 MR. MIZER: The court said that you had can
19 raise in a judgment as a matter of law motion legal
20 arguments like the statute of limitations, collateral
21 estoppel, preemption. Very often --

22 JUSTICE BREYER: Okay. Suppose we can say
23 this: That when a lawyer uses 50(a) to make the kind of
24 motion that does not involve sufficiency of the evidence
25 but rather, in fact, could be made without 50(a), under

1 those circumstances he doesn't have to say 50(b). How
2 would that work?

3 MR. MIZER: That would work just fine from
4 our perspective, Your Honor, and in fact --

5 JUSTICE BREYER: It would work fine, because
6 it seems to me you have a lot of sufficiency of the
7 evidence claims, but that's another question.

8 JUSTICE SCALIA: Excuse me. Why do you --
9 why do you seem to concede that 50(a) only -- only
10 applies to evidentiary stuff? I mean, what we agree is
11 if during a trial by jury, a party has been fully heard
12 and there is no legally sufficient evidentiary basis for
13 a reasonable jury to find for that party on that issue,
14 well, as a matter of law, no amount of evidence would
15 ever allow a jury verdict in that direction. Surely
16 that falls within (a), even though evidence has nothing
17 to do with it.

18 No matter what the evidence is, this is
19 simply a matter of law. No jury, no reasonable jury,
20 could find for that party on that issue. I don't read
21 this as being purely a -- you know, a provision
22 governing whether there is enough evidence in an area
23 where there is no absolute rule of law. I think it
24 applies to the absolute rule of law as well.

25 MR. MIZER: If Rule 50(b) -- if Rule 50(a)

1 and 50(b) motions were required for all matters of law,
2 then that would change the Hornbook understanding of
3 what 50(b) is about. It would expand the Unitherm
4 requirement in ways that it hasn't been applied before,
5 and it would turn Rule 50(b) motions into a
6 clearinghouse for anything that must be raised -- that
7 is going to be raised on appeal.

8 JUSTICE SOTOMAYOR: Is that the -- that is
9 what the Chief Justice asked you earlier. Why is that
10 such a horrible thing?

11 MR. MIZER: Your Honor, because it would
12 radically change the way that 50(b) is currently treated
13 by parties. If it, for example, in the surgeon district
14 of Ohio, where this case --

15 JUSTICE SOTOMAYOR: You -- I'm not sure that
16 answers the question.

17 Isn't it better for the Court of Appeals to
18 know a district court's opinion on every issue that's
19 going to come up on appeal, and wouldn't our
20 announcement of the rule -- that whether it's an issue
21 of law or fact, it has to be renewed under 50(b), so
22 everybody's on the same page as to what's going to be
23 heard on appeal -- why is that a bad rule? Why would
24 that be a bad outcome as a matter of law?

25 MR. MIZER: Because, Your Honor, the

1 Rule 50(b) motions would then become miniature -- or not
2 even miniature -- full-blown appellate briefs. And the
3 ruling in the southern district of Ohio at the moment,
4 for example, is that Rule 50(b) motions are 20 pages
5 long.

6 JUSTICE ALITO: The answer is it's a
7 pointless gotcha rule. Isn't that the answer? It's a
8 pure issue of law, and the district court has already
9 said, I ruled on this on summary judgment; don't bother
10 me with this again, and we're going to say: Well, you
11 still have to raise it in a 50(b) motion. That --
12 there's no point. We might as well say that the lawyer
13 has to stand on his head when the motion is made or jump
14 up and down three times.

15 MR. MIZER: That's correct, Your Honor.

16 JUSTICE SCALIA: The point would be that
17 therefore, you don't have to sort out whether there is
18 any factual content to this issue. You don't have to
19 sort out what's a pure question of law and what is a
20 mixed question of law and fact, which is always very
21 difficult. What's the big deal? Make the motion.

22 MR. MIZER: Because, Your Honor, the
23 district courts have never insisted, nor do the rules
24 insist, that the district courts get multiple cracks at
25 a legal question.

1 JUSTICE GINSBURG: The purpose of -- of
2 50(b) -- Justice Alito brought out that it's not simply
3 the historical background of the Seventh Amendment, but
4 in that same line of cases, the court gave a practical
5 reason. And the practical reason related to the
6 district court, that if the motion is made after the
7 jury comes in, the district judge would have the
8 opportunity to exercise her discretion to grant a new
9 trial.

10 Let's take -- is it Ms. Bright where the
11 Sixth Circuit said that, well, maybe there could have
12 been a retaliation claim, but the Plaintiff didn't make
13 it? The district judge, given the chance, might have
14 said: I would exercise my discretion to allow the
15 Plaintiff to have a new trial on this retaliation claim.
16 I thought it was before the Court and it was a good
17 claim. The Sixth Circuit thought it wasn't.

18 I mean, the purpose is to get the district
19 judge into the picture to exercise the district judge's
20 discretion on the very question.

21 MR. MIZER: But if a claim is not in a case,
22 Your Honor, then there is no discretion as to whether or
23 not to give it to the jury. So just as the qualified
24 immunity question doesn't belong with the jury, so, too,
25 a claim that hasn't been adequately pressed doesn't go

1 to the jury.

2 So we are not talking about questions that
3 should and can be resolved by the jury. We are talking
4 about legal claims that the jury has no business
5 deciding --

6 JUSTICE BREYER: Your case, anyway, is a
7 case -- judging from what they wrote, I'm back to where
8 I started with the mixed questions and fact-based
9 questions -- where you really have to renew your motion,
10 and reading your opinion it seems to me it's filled with
11 determinations of fact. They were reviewing what the
12 jury did and could have found, and on the basis of what
13 they could have found, they say you're not entitled
14 to -- or you are entitled to qualified immunity.

15 So this would seem like a Hornbook case
16 where you have to make the motion, and if you have to
17 make the motion, you didn't, and if you didn't, you
18 don't go back and review the facts as -- the motion on
19 the basis of the facts as they were before the trial.
20 End of matter. What's wrong with that?

21 MR. MIZER: I would disagree with the
22 characterization of the Sixth Circuit's opinion as
23 resolving factual questions, because on the contrary, I
24 think --

25 JUSTICE BREYER: No, I mean they went on the

1 jury's resolution of the facts.

2 MR. MIZER: That's correct. And so it's
3 the -- the --

4 JUSTICE BREYER: For that reason, they can't
5 take the facts as they were in your motion for summary
6 judgment. They have to take them on the basis of --
7 they can't just go back and review them on the -- yes.

8 MR. MIZER: That goes to show, Your Honor,
9 that the Sixth Circuit wasn't doing what Ms.
10 Ortiz has -- what Ms. Ortiz has posited, which is that
11 they were reviewing the summary judgment record order.

12 JUSTICE KAGAN: Well, Mr. Mizer, suppose
13 that they were. Suppose they committed an error in that
14 respect, and they thought they were reviewing the
15 summary judgment order and not the final judgment.

16 If that's what they thought, would you agree
17 that they had no jurisdiction at that point to take that
18 appeal because the 30 days had run?

19 MR. MIZER: Yes. Then it would be like a
20 late collateral order appeal.

21 JUSTICE KAGAN: So your position rests, is
22 dependent, on our finding that the Sixth Circuit was
23 reviewing the final judgment order, which was not what
24 the Sixth Circuit in fact said it was doing.

25 MR. MIZER: Again, I would disagree that

1 that's what the Sixth Circuit said because of the
2 language at the bottom of page 7A of the petition
3 appendix, where they clearly say that there is an appeal
4 from the verdict.

5 And so because it's demonstrably not true
6 that they were treating the summary judgment order as
7 the final appealable order here, the question presented
8 by Ms. Ortiz is not actually presented by this case.
9 And the further argument that a 50(b) motion was
10 required here under Unitherm were never made in the
11 Sixth Circuit and not made in her opening cert petition,
12 and so that argument also was not presented by this
13 case.

14 And so I think the clear resolution is to
15 dismiss the case as improvidently granted, but if the
16 Court were inclined to view that the merits should be
17 breached, then the clear rule that we posit resolves the
18 case, which is that orders made by the district court
19 along the way in the course of a district court
20 proceeding are adequately preserved for appellate review
21 from the final judgment once they are pressed and passed
22 on below.

23 JUSTICE KENNEDY: I didn't hear your
24 last -- are adequately preserved when?

25 MR. MIZER: Once they are pressed and passed

1 on by the district court, and the qualified immunity
2 claim here was pressed and passed on --

3 JUSTICE KENNEDY: So you are saying that if
4 there is anything in the record of trial that indicates
5 the judge ruled on the issue, there need not be a 50(b)
6 motion?

7 MR. MIZER: That's correct, Your Honor, and
8 the lower courts, I think, are well-equipped to assess
9 whether or not an issue has adequately been pressed and
10 passed on in the district court.

11 That has been the settled rule of appellate
12 reviewability, and I don't think that it should be
13 changed by imposing a Rule 50(b) requirement for
14 anything other than a sufficiency of the evidence
15 motion.

16 CHIEF JUSTICE ROBERTS: I just want to be
17 clear. Your answer to Justice Kennedy had the caveat
18 that except for the issue we addressed in Unitherm?

19 MR. MIZER: That's correct.

20 CHIEF JUSTICE ROBERTS: Okay.

21 MR. MIZER: If there are no further
22 questions, we ask you to affirm the Sixth Circuit.
23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

25 Mr. Mills, you have three minutes remaining.

1 REBUTTAL ARGUMENT OF DAVID E. MILLS
2 ON BEHALF OF PETITIONER

3 MR. MILLS: Thank you.

4 One thing that's important about the Sixth
5 Circuit's language when it said it was reviewing summary
6 judgment, the single decision it cited was the Eighth
7 Circuit's decision in Goff v. Bise. Now, in that -- in
8 that decision, the Eighth Circuit said yeah, we can
9 review this after trial even though it was summary
10 judgment, because it's qualified immunity, but the
11 Eighth Circuit actually ignored the trial evidence. It
12 actually did this seemingly illogical step of just
13 looking at the summary judgment evidence as-is.

14 Now, I think what that shows is the Sixth
15 Circuit was definitely reviewing summary judgment but
16 it, implicitly at least, recognized that would be
17 entirely illogical. So it tied its decision to the only
18 decision by the district court on qualified immunity,
19 summary judgment, and said: We've got to look at what
20 really happened in this case. And so they looked ahead.

21 Now, the reason the question is adequately
22 presented is because I think the Sixth Circuit's
23 decision shows this entire debate about Unitherm and
24 whether this was a quasi-50(a) review is one of the
25 precise reasons the Sixth Circuit hinged its decision on

1 summary judgment.

2 I think it was quite aware that an appellate
3 court, since at least 1947, in Cone, cannot review the
4 sufficiency of the evidence at trial and overturn the
5 jury's verdict. And so the Sixth Circuit said: Wait a
6 second; we can look to the summary judgment record.

7 Now --

8 JUSTICE SOTOMAYOR: What's the rule you want
9 us to adopt to answer the question presented? You asked
10 us to take cert on a question presented. What is the
11 answer you want us to give on the question presented?

12 MR. MILLS: Yes. The answer is that a party
13 may not appeal a denial of summary judgment after trial.

14 JUSTICE SOTOMAYOR: In no circumstances?

15 MR. MILLS: I would say that the clearest
16 rule is to say that in no circumstances. That's the
17 position of the Fourth Circuit. You say if you want
18 counsel judgment, simply make your motion.

19 But I would add that whichever way this
20 court goes, the decision here has to be reversed,
21 because there is no doubt that the legal issue of
22 qualified immunity at summary judgment depended entirely
23 on the officer's conduct at trial.

24 CHIEF JUSTICE ROBERTS: So your rule, in
25 response to Justice Sotomayor, would basically require

1 anyone who has an assertion of qualified immunity to
2 take their collateral appeal or interlocutory appeal.

3 MR. MILLS: It would only require it, Your
4 Honor, to the extent that they wish to challenge that
5 decision on the summary judgment record. I am not at
6 all suggesting that that appeal is required to preserve
7 the issue of immunity. It's easily preserved, but to
8 the extent a trial occurs on the officer's conduct and
9 the officers want to say: Wait a second, we're still
10 immune, that evidence even at trial is insufficient for
11 liability. You have got the right to preserve your
12 immunity issue, but you have to have the district court
13 consider the question.

14 CHIEF JUSTICE ROBERTS: So they are put to a
15 choice whether or not their qualified immunity claim
16 rests entirely on law or might turn out, as you say it
17 did in your case, to have some factual aspect?

18 MR. MILLS: That's right.

19 CHIEF JUSTICE ROBERTS: Well, that's kind of
20 a tough choice to put them to, isn't it?

21 MR. MILLS: Well, they have an absolute
22 right to take that immediate appeal and -- and they
23 chose not to.

24 CHIEF JUSTICE ROBERTS: So they have to take
25 the immediate appeal, and when they do so, they lose the

1 right to appeal at the end?

2 MR. MILLS: No, they do not.

3 CHIEF JUSTICE ROBERTS: Well, why is that?

4 MR. MILLS: They do not because if they lose
5 the appeal and they go to trial, you've got a new case.
6 You've got -- I shouldn't say a new case. You have got
7 new evidence of conduct. So there is no loss of the
8 issue of immunity. It is just that it turns on the
9 facts from the trial.

10 JUSTICE SCALIA: You assumed all the
11 evidence in their favor at the summary judgment stage.
12 So do you really think that this is a realistic scenario
13 where there's going to be even more evidence against
14 them than -- I mean, you are assuming the evidence
15 against them. There is going to be even more evidence
16 against them than they assumed at summary judgment?
17 That's not going to happen very often.

18 MR. MILLS: It happened here.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
20 The case is submitted.

21 (Whereupon, at 11:04 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

A	Alito's 11:1,4 17:19 allegations 21:19 allow 18:11 43:15 46:14 amendment 12:13,20 13:6 34:16 36:20,21 36:22 38:20 39:3,4 46:3 amount 37:8 43:14 amounted 40:20 40:22 ample 6:4 analysis 41:2 announcement 44:20 answer 9:15 10:25 23:22 37:11 45:6,7 50:17 52:9,11 52:12 answered 38:13 answers 44:16 anyway 47:6 apparently 31:5 42:4 appeal 3:12 8:11 16:4 18:8,12,16 23:16 26:14,18 26:19,22 29:21 32:22 33:21,22 41:15 44:7,19 44:23 48:18,20 49:3 52:13 53:2 53:2,6,22,25 54:1,5 appealable 4:19 25:23 29:17 49:7 appealed 4:17 37:5 appeals 3:24	7:12 8:25 9:3 10:23 11:25 12:25 13:2,11 14:21 16:10 18:19 29:10 44:17 APPEARANC... 1:14 appellate 15:24 30:2 45:2 49:20 50:11 52:2 appendix 26:21 26:25 34:5 49:3 application 17:11 40:4 applied 44:4 applies 43:10,24 apply 11:18 39:16 approach 14:1 appropriate 7:10 28:2 area 12:10 43:22 arguably 8:13 argue 22:20 arguing 32:25 argument 1:12 2:2,5,8 3:4,7 7:13 9:4 11:24 11:25 13:13,24 13:25 15:20 16:1,2 17:16 18:4 25:15 28:6 28:15 30:5,6,13 31:16,17,17 34:7,8 36:5 37:1 41:13,16 49:9,12 51:1 arguments 34:7 34:10 42:20 articulate 35:25 asked 26:13 44:9 52:9 asking 24:13,13	40:21 aspect 53:17 assault 6:15,20 10:12,12 20:11 20:13,13 assaulted 33:18 assertion 53:1 assess 24:23 50:8 assessment 26:7 40:2 assume 18:18 25:8,9 assumed 19:23 19:24 25:5 32:13 33:23 54:10,16 assumes 19:7 assuming 25:2 31:19 35:5,25 39:20 41:5,7 54:14 assumption 25:21,21 as-is 51:13 attended 37:17 atypical 38:6 authority 13:19 13:23 14:14 22:18 automatically 20:20 aware 34:4 35:13 35:14 52:2 awful 30:8 a.m 1:13 3:2 54:21	12:13 46:3 bad 44:23,24 bare 6:15 barred 5:19 base 32:4 based 3:19,20,25 7:4 15:22 17:8 21:18 26:2,15 27:7 36:18 38:19,20 basic 23:5,24 24:1,3 basically 41:24 52:25 basis 14:13 31:9 31:12,13,15 34:23 43:12 47:12,19 48:6 begins 25:24 behalf 1:15,18 2:4,7,10 3:8 25:16 51:2 belief 8:14 belong 46:24 belt 35:22 belts 35:22 benefit 16:17 19:11 BENJAMIN 1:17 2:6 25:15 best 15:8 better 17:16 19:23,24 20:4 44:17 big 31:2 45:21 Bise 51:7 bit 4:17 22:6 29:4 body 6:5 bolsters 19:16 botching 10:18 bother 45:9 bottom 26:20,22 49:2 breached 49:17
----------	---	--	--	---

bread 23:14 break 36:2 Breyer 22:7,18 22:25 23:11,14 23:16 28:5,13 28:17 29:1,3 39:11 41:20 42:22 43:5 47:6 47:25 48:4 Breyer's 24:16 brief 5:8 11:13 26:19 35:16 briefs 45:2 Bright 6:17 10:10 14:24 20:11 36:3,4 37:20 46:10 bringing 30:20 broad 41:17 brought 6:1 46:2 built 9:16 10:5 business 47:4 butter 23:14 buy 30:9 <hr/> <p style="text-align: center;">C</p> <hr/> C 1:17 2:1,6 3:1 25:15 called 5:6 11:12 18:17 40:15 calls 26:22 case 3:4,15 4:1 6:9,12,25 7:6 8:5 11:10,12 12:9 13:6 14:23 15:4,8 16:22 17:1,5,6,13,15 17:18,20 18:4,5 18:25 19:1,3 20:2,5 21:18 23:5,14 25:23 28:7,18 29:9 31:4,7,19 32:21 33:15 35:9,13 35:15 36:17	38:10 39:8 40:16,18,23,25 42:5 44:14 46:21 47:6,7,15 49:8,13,15,18 51:20 53:17 54:5,6,20,21 cases 8:15 10:20 12:7,10 14:15 26:7,8 29:10 32:17 35:14 41:21 42:14 46:4 categorization 39:15 category 39:10 caveat 50:17 caved 22:5 cell 20:25 cert 7:7 49:11 52:10 certain 25:3,4 certainly 10:6 16:21 certiorari 9:9 challenge 25:8 53:4 chance 17:2 46:13 change 6:9 16:23 21:1 44:2,12 changed 15:19 50:13 characterization 47:22 Chief 3:3,9,16 4:12,20 18:3,24 21:3,11,21 25:13,17 29:15 30:18 39:16 42:3 44:9 50:16 50:20,24 52:24 53:14,19,24 54:3,19	choice 26:11 27:12 53:15,20 chose 53:23 chosen 26:15 circuit 4:25 6:25 7:2,20,24 9:13 9:16 11:9,12,16 13:18,19,21,25 14:5,6 15:3,12 15:15 21:2 23:4 25:22 26:6,9,18 26:22,24 27:10 27:25 31:18 35:16 36:16 37:5 38:1,4 41:3 42:4 46:11 46:17 48:9,22 48:24 49:1,11 50:22 51:8,11 51:15,25 52:5 52:17 circuits 4:24 41:18 Circuit's 10:13 26:10 27:13 38:13 41:9 47:22 51:5,7,22 circumstances 43:1 52:14,16 circumventing 14:18 citations 10:2 cite 33:6,8 35:16 cited 11:13 51:6 claim 3:14 5:13 11:7,21 12:12 27:20 32:10,10 32:13 36:2,4,9 36:17,18,18 38:2 39:11,12 40:19 41:16 46:12,15,17,21 46:25 50:2 53:15	claiming 11:3 claims 3:19,20 8:17 12:3 17:14 19:8 24:3,5 29:12,14,14,22 35:17,17 36:3 37:19 39:6,10 39:20 43:7 47:4 classic 25:8 28:10 clause 4:12 12:14 34:15 clear 8:25 12:5 18:20 26:12 27:12 34:6,12 39:17 49:14,17 50:17 clearer 27:14 30:14 clearest 52:15 clearinghouse 44:6 clearly 4:7 16:8 16:16 18:2,21 18:21 24:11,22 25:4 31:22 38:14 40:4,10 41:17 49:3 Cleveland 1:15 client 28:20,22 close 31:2 cold 20:15 collateral 16:4 18:8 29:10,17 41:15 42:10,20 48:20 53:2 Columbus 1:17 come 8:11 14:12 18:6,10 25:10 42:16 44:19 comes 46:7 comment 6:12 committed 48:13 compelling 16:22	complicated 29:18 component 24:20 components 24:8 concede 9:15,20 9:21,22 27:3 43:9 conceded 10:11 concerning 29:9 29:10 concerns 13:6 39:4 concession 3:18 conclude 15:17 conditions 37:9 38:7 conduct 4:1,2 13:3 14:17 16:11 17:22,25 17:25 18:1 19:5 19:19 24:19 31:25 32:12 35:2,5 39:22 40:20,22 41:3 52:23 53:8 54:7 Cone 10:20 52:3 confinement 36:7,13 37:8,10 37:16 38:6,8,10 conflicts 8:23 confusion 4:25 consequences 6:13 consider 9:5 10:24 11:9 13:11 17:2 18:9 30:3 53:13 consideration 11:24 considerations 38:20,21 consistent 18:7 constitutional 12:19 14:18
--	---	--	--	--

<p>17:23 18:2 24:11 34:10 36:8 content 45:18 context 12:5 23:24 29:11,16 continue 29:20 contrary 47:23 controverting 39:22 converse 30:22 correct 8:12 9:19 12:22 36:15 40:16 45:15 48:2 50:7,19 correctness 35:6 couched 26:19 counsel 18:4 25:13 34:14 50:24 52:18 54:19 couple 7:17 10:14 16:3 35:10 course 4:3 16:3 49:19 court 1:1,12 3:10 3:24 5:12,23 7:12 8:25 9:2,3 10:17,22,23 11:22,25 12:1,5 12:11,24,25 13:2,4,4,11 14:16,21,22 15:4,5,10,17 15:21 16:9,10 16:10,16,25 17:1,5 18:19 19:3 25:18 30:13 31:6,11 32:8,17 33:13 36:12 37:6,13 37:19 38:3,17 39:2 40:15,23</p>	<p>42:18 44:17 45:8 46:4,6,16 49:16,18,19 50:1,10 51:18 52:3,20 53:12 courts 5:4 25:25 27:4 30:2,2 45:23,24 50:8 court's 8:24 10:19 14:19,20 18:17,23 29:9 41:18 44:18 cracks 45:24 create 30:23 creates 30:8 cross 3:14 10:11 18:2 crossed 14:18 17:22 18:23 24:23 28:20,22 32:15 cross-examina... 6:17 14:24 19:19 20:11 22:6 cross-examined 8:2 crucially 6:19 currently 44:12 custody 37:24</p> <hr/> <p>D</p> <p>D 3:1 DAVID 1:15 2:3 2:9 3:7 51:1 day 24:17 days 48:18 deal 31:2 45:21 debate 11:17 51:23 decide 13:10 deciding 47:5 decision 3:12 5:3 7:21 8:7 13:22 15:9,10,18 51:6</p>	<p>51:7,8,17,18 51:23,25 52:20 53:5 decisions 8:24 38:21 41:18 defendants 7:3 7:13 8:8 16:18 18:18 defenses 3:22 5:8 definitely 51:15 deliberate 40:19 40:20 41:3 demonstrably 49:5 demonstrated 25:20 denial 3:11 8:4 18:8 23:16 25:25 26:2 27:5 27:7 52:13 denied 21:14 32:21 denies 15:21 depend 3:22 5:6 5:10 26:7 30:7 depended 52:22 dependent 48:22 depending 35:11 depends 3:13 40:2 described 16:25 determinations 47:11 determined 7:3 determining 24:25 difference 3:18 3:21 5:11,21 29:8 30:6 different 5:15 9:17 14:7 21:22 29:4 31:16,24 34:6,23 36:17</p>	<p>40:21 41:1 differently 14:9 differs 35:3 difficult 25:1 29:18 30:11 39:16 45:21 difficulties 30:23 difficulty 29:20 30:8,20 direction 43:15 disagree 17:10 47:21 48:25 disagreement 16:14 discretion 14:25 46:8,14,20,22 discussing 6:11 discussion 25:19 dismiss 49:15 dismissal 38:24 dismissed 37:19 dispute 33:20 34:8,9 disputed 4:5 21:5 33:12,17,19 disputes 21:23 disputing 11:8 dissent 39:4 dissenters 11:17 distinction 11:10 11:11 33:16 distinguish 12:11 distinguishing 8:16 district 9:2 10:17 10:22 13:4 14:16,19,22 15:4,5,10,21 16:9,16 17:1,5 21:17 32:8 36:11 37:13,19 44:13,18 45:3,8 45:23,24 46:6,7 46:13,18,19</p>	<p>49:18,19 50:1 50:10 51:18 53:12 divides 29:11 doctrines 11:18 document 37:13 doing 7:22 10:16 27:14 28:2 42:9 48:9,24 double 30:20 doubt 19:11 24:9 24:22 52:21 due 36:4,18 37:8 D.C 1:8</p> <hr/> <p>E</p> <p>E 1:15 2:1,3,9 3:1 3:1,7 51:1 earlier 20:8 44:9 easier 29:24 30:1 easily 53:7 effort 35:22 Eighth 15:14 51:6,8,11 either 10:13 22:11 35:18 element 19:14 19:17 employed 11:12 enter 3:24 16:8,9 19:4 Enterprises 35:15 entire 8:23 9:25 14:19 51:23 entirely 21:2 51:17 52:22 53:16 entitled 7:3 8:8 18:14,15 47:13 47:14 entry 7:14 error 11:18 48:13 especially 3:12</p>
--	---	---	---	--

3:17 ESQ 1:15,17 2:3 2:6,9 essence 11:2 essentially 8:22 13:1 establish 24:20 established 4:7 16:8,16 18:2,21 18:22 24:11,22 25:4 31:22 38:14 39:6 40:4 40:11 estoppel 42:11 42:21 ET 1:6 everybody 26:5 40:9 everybody's 44:22 evidence 3:13,19 3:22 4:2 5:1,6 5:10,12,18,22 6:6 7:2,4,22 9:1 10:22 13:3 14:9 14:10,21 15:6 17:7,8 19:20 23:5,6,7 27:1 27:19 28:21 29:5 30:15 31:2 31:7 32:11 34:21 41:25 42:17,24 43:7 43:14,16,18,22 50:14 51:11,13 52:4 53:10 54:7 54:11,13,14,15 evidentiary 29:13 31:9,12 31:12,15 43:10 43:12 exact 11:14 exactly 7:19 8:11 16:13 23:9	example 5:14 6:8 9:22 10:10 13:7 20:7 33:16 44:13 45:4 examples 5:8 exception 15:13 26:3 27:8 42:14 exchange 13:17 Excuse 43:8 exercise 16:20 46:8,14,19 existed 9:18 exists 32:11 39:18 expand 44:3 explain 14:5 33:25 explained 14:20 explains 12:24 explanation 34:14 expressly 15:12 extent 3:24 9:21 10:8 19:3 28:12 28:15 53:4,8 extra 37:15 <hr/> F <hr/> fact 6:4,4 11:5 21:24 22:4,11 22:12 23:21,21 23:23 24:4,4,6 25:4 31:3 33:19 33:23 40:5 42:25 43:4 44:21 45:20 47:11 48:24 facts 4:4,5 10:1,3 10:9,9,15,15 10:16 13:21,23 15:16,19 16:12 16:15,22 17:7,9 17:15 18:5,6,10 18:18 21:5,5 24:24 25:3,5,9	28:7,7 29:6 30:7 31:19,20 33:13,13 34:8,9 35:7 36:1 39:20 47:18,19 48:1,5 54:9 factual 7:9 19:14 19:16 21:22 24:14,18 29:23 33:20 45:18 47:23 53:17 fact-based 47:8 failing 13:14 failure 32:17 fair 22:16 fairly 39:15 fairness 38:22 fall 4:11 24:15 falls 43:16 false 25:21 favor 54:11 feel 14:23 17:1,6 17:7 feeling 17:5 Fifth 14:5 figure 30:2 filed 5:16 7:15 fill 4:14 filled 47:10 final 25:23 48:15 48:23 49:7,21 find 22:22 29:16 31:9 43:13,20 finding 34:22 48:22 fine 29:3 43:3,5 finish 20:17 first 3:4 6:14 7:19 9:23 14:22 14:24 16:3 17:2 20:10 30:10 34:16 36:20,21 fixed 8:20 following 34:3	follows 26:4 footnote 12:22 12:23 foreclosed 41:17 forfeited 11:16 13:24 forfeiture 9:4 12:4 14:2 forget 28:18 forgets 23:18 formulation 40:1 forth 22:10 forward 30:7 found 47:12,13 founded 17:15 four 42:12 Fourth 52:17 frankly 14:1 22:5 full 27:14 fully 43:11 full-blown 45:2 fundamental 7:23 16:5 further 49:9 50:21 <hr/> G <hr/> G 3:1 general 1:17 5:1 12:3 Ginsburg 5:20 6:8 12:8,21 14:4 15:2 21:12 21:16 27:2 31:3 32:2 33:25 34:12 35:9 37:14,22 38:9 39:9 46:1 Ginsburg's 41:23 give 19:11 32:17 46:23 52:11 given 14:12 31:19 32:13,25 33:13 35:5 46:13	go 9:25 19:17 23:10 28:20 34:13,17 41:20 46:25 47:18 48:7 54:5 goes 10:19 12:23 23:7 48:8 52:20 Goff 51:7 going 3:24 4:15 5:2 13:2 18:10 19:4,22,23 27:19 28:19 30:7 31:1 40:4 42:7 44:7,19,22 45:10 54:13,15 54:17 Gonterman 11:13 good 5:8 13:6 30:6 46:16 gotcha 45:7 governing 43:22 grant 13:10,14 14:25 46:8 granted 7:7 9:9 13:10 17:3 49:15 grounded 38:21 grows 19:20 guard 33:18 guess 23:19 guidance 39:17 39:18 <hr/> H <hr/> halves 29:12 happen 54:17 happened 20:9 23:9 40:9 51:20 54:18 hard 30:19 hardship 38:7 Harlow 32:14 33:4,11,14 35:7 head 45:13
---	---	--	--	---

<p>hear 3:3 49:23 heard 28:21 43:11 44:23 heart 4:24 10:19 held 36:16 38:1 helps 10:15 highlights 7:23 9:12 13:16 hinged 51:25 hinges 25:20 historic 34:18 historical 46:3 history 12:18 hold 8:4 holding 35:10 37:6 38:4,13 41:10 Honor 4:10 11:8 15:7 20:1 22:2 25:11 26:16 28:14 29:8 30:23 32:7 34:5 35:1 41:1 43:4 44:11,25 45:15 45:22 46:22 48:8 50:7 53:4 horn 24:1 hornbook 23:24 24:3 44:2 47:15 horrible 44:10 hypothetical 17:19 28:25 40:9</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ignore 8:2 23:9 27:17 ignored 51:11 ill 37:16 illogical 7:25 23:9 27:21 51:12,17 imagine 23:12 immediate 18:15 53:22,25</p>	<p>immediately 6:14 20:10 immune 53:10 immunity 3:19 3:23,25 5:11,12 15:11,14,22 16:6,7 17:24 18:5,10,15,25 23:12 24:20 26:3 27:7,11,21 29:7,11,11,14 29:22 32:24 33:23,24 39:6 39:20 40:3 41:16 46:24 47:14 50:1 51:10,18 52:22 53:1,7,12,15 54:8 implicated 39:5 implicitly 7:25 51:16 implied 4:19 important 13:17 20:25 51:4 imposing 50:13 improper 15:17 improvidently 49:15 incident 20:18 inclined 49:16 include 24:21 including 26:5 35:14 incomplete 41:22 incorporating 10:9 indicated 34:14 indicates 50:4 indifference 40:19,20 41:3 individual 37:7 inquiries 24:9,15 24:18</p>	<p>inquiry 16:7 17:24 41:12 insist 45:24 insisted 45:23 instance 28:10 instances 10:7 42:16 instruction 32:18 32:24 33:2,3,10 37:12 instructions 15:4 32:20 insufficient 25:11 53:10 intent 41:6 interlocutory 53:2 interrupt 3:17 intersection 28:20,23 invocation 14:2 invoke 18:14 invoked 15:12 invokes 16:24 involve 42:24 involves 22:11 22:13 42:1,2 Iqbal 18:23 issue 4:5,7,9,21 4:22 5:24 8:14 11:14 13:13 15:22,23 16:19 23:8 27:10 28:3 29:18 32:7,9,18 32:21 40:1,13 43:13,20 44:18 44:20 45:8,18 50:5,9,18 52:21 53:7,12 54:8 issues 4:18 5:5 24:7 issue's 11:15</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Johnson 18:17</p>	<p>30:14,17 31:23 39:18 40:25 joint 34:5 Jones 18:17 31:23 39:18 Jordan 1:6 3:5 6:14,18 20:9,18 33:18 36:3 Jordan's 41:6 judge 21:17 28:19 46:7,13 46:19 50:5 judge's 14:25 46:19 judging 47:7 judgment 3:11 3:24 4:16,18,21 5:2,3,5,22 6:3 6:10,15 7:1,4 7:10,11,14,21 7:24 8:1,5,7,9 8:21 9:13,18,25 10:9,14 13:11 13:20,22 14:7 15:9,13,18,21 16:8,9,17 18:1 18:9,14 19:4,10 19:25 21:1,4,6 21:8,13,14 22:9 22:11 23:8,10 23:17 25:22 26:1,2,14,17 27:5,6,11,18 27:22 28:1 31:14 32:9 34:24 35:18 37:20 38:23 42:19 45:9 48:6 48:11,15,15,23 49:6,21 51:6,10 51:13,15,19 52:1,6,13,18 52:22 53:5 54:11,16</p>	<p>jump 45:13 jurisdiction 11:9 11:10,19 12:9 48:17 jurisdictional 8:15,16 11:2,6 11:7 jury 14:22 26:23 31:8,8 33:10,12 34:22,25 37:12 39:7 43:11,13 43:15,19,19 46:7,23,24 47:1 47:3,4,12 jury's 48:1 52:5 Justice 3:3,9,16 4:3,11,12,20 5:20 6:8,24 8:3 9:7,14,15,23 10:25 11:1,4,21 12:8,21 13:8,16 14:4 15:2,20 16:12 17:4,19 18:3,24 19:6,10 19:13,22 20:3,6 20:17 21:3,11 21:12,16,21 22:7,18,25 23:11,14,16 24:2,7,12,16 24:25 25:13,17 25:24 26:13,21 27:2,4,16 28:5 28:13,17 29:1,3 29:15 30:17,18 30:25 31:3 32:2 32:16 33:1,6,25 34:11,12 35:9 35:24 36:20,23 37:1,11,14,22 38:9,18 39:3,9 39:11,16,24,25 40:7,8,13,17 40:18 41:20,23</p>
---	---	--	---	---

42:22 43:5,8 44:8,9,15 45:6 45:16 46:1,2 47:6,25 48:4,12 48:21 49:23 50:3,16,17,20 50:24 52:8,14 52:24,25 53:14 53:19,24 54:3 54:10,19 Justice's 42:3	large 38:11 largely 6:7,8 larger 6:2 late 5:17 48:20 law 3:20 4:8,10 4:22 5:7 7:4,10 7:11,15 8:9 13:12 15:23 18:18 22:12,14 23:21,23 24:4,6 29:7,9 31:22 35:18 36:1,6 37:7 38:14,24 40:5,14 42:8,13 42:19 43:14,19 43:23,24 44:1 44:21,24 45:8 45:19,20 53:16 lawyer 23:18 28:18 31:1 42:23 45:12 leading 8:24 learns 34:17 legal 3:14 15:25 16:7 17:9,12,14 18:20 23:8 24:7 24:10 28:3,6 29:14,23 32:7 32:10,10,14 33:4,11 35:17 35:17 39:6,11 39:23 41:8,11 42:19 45:25 47:4 52:21 legally 31:8,12 35:23 43:12 let's 5:16 23:11 36:2 46:10 liability 3:15 28:8 53:11 liable 28:23 limitations 5:9 5:14,16,19 42:20	line 3:14 8:23 14:15,18 17:23 18:2,22 24:16 24:23 29:10 30:15,15,17 32:14 35:25 46:4 list 21:4 listed 26:18 litany 12:15 litigated 42:12 little 4:17 27:21 location 20:24 long 45:5 look 5:12 7:25 13:20,23 14:6,8 14:10 27:19,19 28:6 29:5 51:19 52:6 looked 22:9 41:22 51:20 looking 10:16 15:16 19:5 28:2 41:4 51:13 looks 5:22 lose 53:25 54:4 loser 11:15 12:15 loss 54:7 lost 23:19,20,22 lot 30:1,8 43:6 lower 50:8	54:22 matters 24:3 29:17 44:1 mean 9:8 10:4 17:13,17 18:23 22:19 28:9,17 43:10 46:18 47:25 54:14 means 23:6 27:17 42:11 meant 20:23 21:24 27:10 medical 37:18 merits 3:13 26:1 27:6 38:16 49:16 mess 30:19 Michelle 1:3 5:16 middle 29:24 Mills 1:15 2:3,9 3:6,7,9,21 4:9 4:23 5:20 6:7 7:17-8:18 9:10 9:14,20 10:6 11:8 12:2,21 13:8,16 14:11 15:7 16:2,21 17:4,17 18:13 19:2,9,12,15 20:1,4,7,21 21:9,15,20 22:2 22:16,24 23:2 23:13,15,25 24:2,5,8,17 25:7 50:25 51:1 51:3 52:12,15 53:3,18,21 54:2 54:4,18 miniature 45:1,2 minute 22:23 minutes 50:25 misapprehended 26:6	misconduct 5:18 19:20 misread 11:5 missing 10:15 Mitchell 29:9 31:23 40:5 mixed 22:11,14 23:20 24:4,5 25:1,5 36:10 39:10,12 45:20 47:8 Mizer 1:17 2:6 25:14,15,17 26:10,13,16 27:2,9,24 28:12 28:14,25 29:2,8 30:10,22 31:16 32:6,23 33:3,8 34:4 35:1,13 36:16,21,25 37:4,18,25 38:12,18 39:1 39:14,24 40:3 40:12,15,18 41:1 42:18 43:3 43:25 44:11,25 45:15,22 46:21 47:21 48:2,8,12 48:19,25 49:25 50:7,19,21 moment 33:9 45:3 Monday 1:9 months 42:12 moots 5:1 morning 3:4 motion 4:18,21 7:16 8:10 9:25 11:2,6 12:16 13:12,14 16:1 16:19,24 21:13 21:14 22:8,10 23:17,18 26:1 26:14,17 27:5
<hr/> K <hr/> K 35:14 KAGAN 9:14,23 17:4 24:2,7,12 26:13 39:24 40:18 48:12,21 Kennedy 4:3,11 25:24 26:21 27:4 32:16 39:25 40:7,13 49:23 50:3,17 key 16:3 kind 40:22 42:23 53:19 kinds 42:16 know 7:6 16:10 18:5,6 19:7 21:11,16 25:11 35:9 42:10 43:21 44:18 knowing 18:10 knowledge 20:8 21:10 22:4 37:21 41:23 knows 31:1	<hr/> L <hr/> lack 11:19,20,23 lacked 9:4 11:3 lacks 8:25 12:25 12:25 language 49:2 51:5	<hr/> M <hr/> majority 11:17 making 11:10 34:2 map 30:14,18 matter 1:11 5:17 6:5 7:4,10,11 7:14 8:9 13:12 35:18 36:1,6,13 37:6 38:14,23 41:8 42:19 43:14,18,19 44:24 47:20		

28:10,16 30:1 31:1,6,10,13 32:3 34:1,2,3 34:19,19 35:10 35:11,12,21 38:23 40:24 42:19,24 45:11 45:13,21 46:6 47:9,16,17,18 48:5 49:9 50:6 50:15 52:18 motions 30:16 35:18,20 44:1,5 45:1,4 motivated 8:14 move 22:8 31:4 32:9 33:19 38:24,25 muddy 10:8 multiple 45:24	notoriously 25:1 November 1:9 number 5:4,7 10:6 <hr/> O O 2:1 3:1 object 7:14 11:22 11:23 objective 32:14 33:4,11 41:4 objectively 41:9 obligation 21:4 21:25 22:3 occurred 32:12 occurs 53:8 officer 20:23,24 officers 18:14 53:9 officer's 24:19 52:23 53:8 officials 4:1 Ohio 1:15,18 44:14 45:3 okay 8:6 15:15 15:15 28:20,23 29:3 41:20 42:22 50:20 once 32:8 49:21 49:25 opening 26:4 27:3 49:11 opinion 7:1 9:16 10:1 26:25 27:13 44:18 47:10,22 opportunity 14:25 38:23 46:8 opposed 11:7 opposing 21:4 opposition 21:7 21:25 oral 1:11 2:2,5 3:7 25:15	order 14:11 16:4 18:8 25:22,23 28:4 29:10 40:24 41:15,15 48:11,15,20,23 49:6,7 orders 26:17 49:18 ordinary 37:9 Ortiz 1:3 3:4 5:16 10:11 20:8,19 21:9 22:3 30:12 31:9,20 33:17 37:5 38:2,15 41:13,14 48:10 48:10 49:8 Ortiz's 25:20 30:24 34:9 ought 42:8,9 outcome 44:24 outside 22:4 42:9 overturn 52:4 <hr/> P P 3:1 page 2:2 11:14 20:12 26:20,22 44:22 49:2 pages 34:5 45:4 Paper 10:20 paragraph 9:24 part 17:14,14 36:9 participate 37:20 particular 12:5 31:25 32:11,12 35:2 39:22 40:22 particularly 10:17 parties 44:13 Partly 28:14 party 43:11,13 43:20 52:12 passed 32:8	49:21,25 50:2 50:10 PAULA 1:6 peek 7:21 pen 8:6,13,20 perfectly 26:12 27:12 42:3 perspective 6:16 43:4 petition 26:20,24 49:2,11 petitioned 38:3 38:15 Petitioner 1:4,16 2:4,10 3:8 51:2 Petitioner's 34:14 phrases 27:13 picking 10:14 picture 46:19 piece 20:25 pieces 16:3 place 6:22 placing 37:7 plain 11:18 plaintiff 5:23,25 19:8,11,24 20:5 39:21 46:12,15 plaintiffs 35:6 plaintiff's 21:19 please 3:10 25:18 point 5:7,21 6:16 8:19 9:6,7,9,11 9:22 10:10 11:1 12:23 13:17 14:3,13,15 16:6 16:18 17:23 19:16 21:7,17 28:11 33:9 45:12,16 48:17 pointless 16:20 16:24 45:7 points 7:17	policeman 42:12 policy 6:19 posit 49:17 posited 41:14 48:10 position 32:6 37:2,4 48:21 52:17 posits 39:21 possibly 10:24 post-trial 10:4 28:4,6 power 9:1,4 10:23 11:3,11 11:19,20,23 12:6,8,9,9,18 12:25,25 14:3 practical 46:4,5 precise 51:25 preclude 21:5 precluded 6:21 10:12 11:24 20:14 preemption 5:9 42:21 preemptive 13:24 prejudice 38:25 presentation 6:4 6:4 presented 21:18 25:20 38:16 49:7,8,12 51:22 52:9,10,11 presents 7:7,8 preserve 4:22 32:10 40:24 41:16 53:6,11 preserved 27:11 27:21 32:7,21 38:2,2 41:13 49:20,24 53:7 preserves 32:18 pressed 32:8
--	---	---	--	--

46:25 49:21,25 50:2,9 pretty 41:21 prevail 21:22,24 prevailed 21:12 previous 40:23 principle 12:3 23:5 prior 8:7 26:20 38:20 prison 6:18 20:10 37:9 problem 7:23 8:19 Procedure 34:17 procedures 20:10 proceed 12:9 16:4 proceeding 49:20 process 14:19 36:4,18 37:8 processing 8:17 11:7,21 12:3,12 proffered 32:20 prong 41:2,4 prongs 36:5 proper 14:2 33:5 33:10 properly 30:12 30:13 proposed 39:11 protections 16:25 protective 37:24 prove 5:24 28:19 32:12 proved 5:25 28:7 proven 31:25 35:3,4 41:6 provision 12:19 43:21 Pulp 10:20	punitive 37:23 punitiveness 38:1 pure 22:14 23:21 23:23 24:21 40:13 42:8,13 45:8,19 purely 7:8 15:22 15:25 16:6 17:9 17:11,14 18:20 19:5 24:8,10 29:22,23 35:17 39:11 43:21 purported 14:9 purpose 42:7 46:1,18 purposes 33:14 33:23 put 19:18 20:19 20:21 21:6,6,25 22:3,7 53:14,20 putting 20:24 36:6,12 <hr/> Q <hr/> qualified 3:19,23 3:25 5:11,11 15:11,14,22 16:6,7 17:24 18:5,9,25 23:12 26:2 27:7,10,20 29:6,11,11,14 29:22 32:24 33:23,24 39:6 39:19 40:3 41:16 46:23 47:14 50:1 51:10,18 52:22 53:1,15 quasi-50(a) 51:24 question 5:23 7:7 7:8,9 9:2 11:4,6 13:1,4,9,20 14:16,17 15:25	16:15 17:21,24 18:18,20 22:11 22:12,14 23:7 23:20,21,23 24:10,21 25:1,6 25:20 30:11 31:14,24,24 33:12,14,17,21 33:24 34:20 35:2,3,4,8,8 37:3,12,23,25 38:5,5,14,16 40:10,19 42:8 42:10,13 43:7 44:16 45:19,20 45:25 46:20,24 49:7 51:21 52:9 52:10,11 53:13 questioning 35:6 questions 5:7 8:16,17 16:7 17:9,12 24:4,5 24:13,14 47:2,8 47:9,23 50:22 quickly 3:17 quite 5:15,21 52:2 quoted 27:4 <hr/> R <hr/> R 3:1 radically 44:12 raise 16:18 42:19 45:11 raised 7:11,12 8:11 27:11,18 28:3,6 30:12,12 35:17 44:6,7 raises 13:5 raising 21:7 rationale 17:8 reach 17:10 30:14 read 4:19 26:11 26:21 41:21	43:20 reading 11:16,16 20:15 36:11 47:10 real 23:5 realistic 54:12 really 4:16 8:7 8:15 9:12 23:4 27:17 47:9 51:20 54:12 reason 12:14,24 31:5 34:2,4,18 46:5,5 48:4 51:21 reasonable 41:5 41:9 43:13,19 reasonableness 32:14 33:4,11 reasoning 31:18 reasons 51:25 REBUTTAL 2:8 51:1 recognize 23:4 recognized 51:16 recognizes 4:25 recognizing 7:25 18:7 31:13 record 6:2,2,15 8:1 9:16,17,18 9:22 10:1,3,4 10:19 14:6,7 26:7 27:15,22 28:1,3 33:7,9 34:24,24,24 37:13 40:2 41:7 48:11 50:4 52:6 53:5 refer 37:14 39:2 referred 6:25 8:6 referring 12:18 refers 26:25 regarding 32:24 regardless 9:3 14:2	rejects 16:16 related 22:22 46:5 relation 6:12 remaining 50:25 remand 15:3 remanded 8:5 remanding 8:21 removing 20:24 renew 22:8 23:18 28:11,24 29:25 47:9 renewed 15:24 15:25 22:12,15 44:21 repeat 12:15 repeatedly 14:20 reply 11:13 report 6:21 reported 6:14 20:10,18 reporting 6:19 request 26:15 33:5 37:12 requested 32:18 32:23 require 52:25 53:3 required 18:16 20:19 32:19 35:19,23 44:1 49:10 53:6 requirement 41:12,15 44:4 50:13 requires 5:12 25:9 requisite 14:21 reserve 25:12 resolution 48:1 49:14 resolve 33:11 39:7 resolved 4:18
---	--	---	---	---

<p>31:18 47:3 resolves 33:12 49:17 resolving 47:23 respect 35:19 48:14 Respondent 6:18 14:24 22:5 Respondents 1:18 2:7 5:7,18 6:11,16 8:22 13:18 17:20 19:18 25:16 responding 39:3 response 4:19,20 41:5,8 52:25 rests 48:21 53:16 result 10:5 retaliate 36:9 retaliated 36:12 retaliation 36:17 46:12,15 retaliatory 36:15 reverse 17:18 reversed 52:20 review 5:2 8:4,23 9:1,13,21 10:15 10:22 11:19 13:1,10,10,14 15:9,13,18,23 15:24 25:25 27:5 38:3,15 47:18 48:7 49:20 51:9,24 52:3 reviewability 50:12 reviewable 3:11 reviewed 7:2,20 reviewing 7:23 10:14 13:2 14:21 25:22 27:22,25 47:11 48:11,14,23</p>	<p>51:5,15 re-examination 12:13 34:15 right 4:6,7 6:6,8 7:16,19 9:10 12:23 15:2 16:8 16:15 18:13 19:9,12,15 21:14,15,15,20 24:11 25:3 29:15 36:8 37:5 39:12 41:24 53:11,18,22 54:1 rightly 5:21 rights 4:6 right's 24:21 40:10 ROBERTS 3:3 3:16 18:3,24 21:3,11,21 25:13 29:15 50:16,20,24 52:24 53:14,19 53:24 54:3,19 role 6:11 14:19 roughly 22:19,20 routine 38:7 rule 5:1 7:16 8:10 8:14,23 10:18 11:1,24 12:11 12:12 15:25 16:19 22:7,21 23:24 24:1,3 25:8,9 26:3,6 29:25 30:14,21 30:22 32:4 34:12,20,20 41:24 42:3,6 43:23,24,25,25 44:5,20,23 45:1 45:4,7 49:17 50:11,13 52:8 52:16,24</p>	<p>ruled 9:2 45:9 50:5 rules 11:22 12:3 45:23 ruling 9:24 13:4 14:16 19:14,17 25:2 45:3 run 48:18 run-of-the-mine 12:12</p> <hr/> <p>S</p> <hr/> <p>S 2:1 3:1 Sandin 36:6,14 37:7,15 38:5,13 saw 14:23,24 saying 8:8 11:3 14:4 16:18 18:25 19:2 21:23 24:19 27:25 29:4 31:11 32:2,5 36:12 39:10 42:1 50:3 says 10:21 28:18 35:16 42:5 SCALIA 9:7 19:6,10,13,22 20:3,6 30:17,25 43:8 45:16 54:10 scenario 54:12 second 5:5 6:20 10:12 11:15 20:12 24:19 42:4 52:6 53:9 see 15:8 22:3 27:20 35:25 seemingly 51:12 segregated 36:13 37:7 38:6 38:10 segregation 20:20,22 send 15:4</p>	<p>sense 22:21 sentence 26:11 27:3 separate 20:23 35:8 36:23 separated 10:12 serious 13:5 sets 26:4 settled 50:11 Seventh 12:13 12:19 13:5 34:16 35:15 38:19 39:3,4 46:3 sexual 6:14 shackled 37:16 show 28:22 29:5 48:8 shown 34:10 shows 51:14,23 side 21:23 24:15 significant 38:6 simple 17:22 simply 8:20 43:19 46:2 52:18 single 51:6 situation 19:21 25:2 Sixth 6:25 7:2,20 7:24 9:13,16 10:13 11:9 13:18,19,21,25 14:5 15:3,12 21:1 25:21 26:6 26:8,10,18,22 26:24 27:9,13 27:25 31:18 35:16 36:16 37:4 38:1,4,12 41:3,9 46:11,17 47:22 48:9,22 48:24 49:1,11 50:22 51:4,14</p>	<p>51:22,25 52:5 slightest 16:14 slip 8:6,12,13,20 slippery 39:15 Solicitor 1:17 solitary 36:7 somebody 23:1 sorry 3:16 35:15 sort 9:3 16:5 29:18 30:19 45:17,19 sorts 24:14 Sotomayor 10:25 11:21 20:17 27:16 33:1,6 34:11 35:24 36:20,23 37:1 37:11 40:17 44:8,15 52:8,14 52:25 southern 45:3 speaking 34:15 species 31:17 split 4:24 square 38:5 squarely 39:2 stage 6:10 14:8 19:25 26:4 30:21 34:7 54:11 stand 45:13 standard 33:4 started 13:8 47:8 state 22:17 statement 41:24 States 1:1,12 41:19 statute 5:8,14,15 5:19 42:20 stems 12:19 step 51:12 steps 20:22 Stevens 39:3 student 34:17</p>
---	--	---	--	--

stuff 43:10	51:15,19 52:1,6	think 4:24 6:7	42:5	4:14 7:13 9:15
subject 12:4	52:13,22 53:5	7:19,22 9:10,11	treatment 37:18	18:3 19:4 24:18
submissions	54:11,16	9:12 10:8 11:13	37:23	24:24 30:5
36:11	support 28:8	12:22 14:1,11	trial 3:12,22 5:1	understanding
submitted 54:20	suppose 4:5 5:16	15:7,8,16 17:18	5:10,24 6:1,2	10:2 38:19 44:2
54:22	8:3 17:9,10	19:15 22:16	6:17 7:2,5,21	undisputed 16:13
sufficiency 9:1	32:16 40:9	23:2,3,20,22	7:24 9:17 10:5	21:23
10:22 13:3 25:8	42:22 48:12,13	23:25,25 25:19	10:7,9,14,16	United 1:1,12
30:15 35:3 36:2	Supreme 1:1,12	26:10 27:9,12	13:21,23 14:6	41:19
41:25 42:17,24	sure 16:6 38:16	27:13,17,24	14:10 15:1,14	Unitherm 8:24
43:6 50:14 52:4	44:15	30:6,10,14 33:5	15:16,18 16:5	10:21 11:16
sufficiency-ba...	surely 28:5 43:15	33:15 34:6,16	17:2 18:1,7,11	12:23,24 13:2,5
29:13	surgeon 44:13	35:1 36:5 39:1	18:12 19:17,18	14:15 17:5,8,10
sufficient 3:14	surprised 12:17	39:5,14,16 40:8	20:4,8,12 21:1	17:11,16 38:19
4:22 15:6 31:9	suspenders	42:16 43:23	21:18 23:6,7,9	39:1 44:3 49:10
31:12,15 32:11	35:22	47:24 49:14	23:17 26:1,25	50:18 51:23
34:21 42:1,2		50:8,12 51:14	27:6,15,19,20	unnecessary
43:12	T	51:22 52:2	28:20,21 30:2	32:4
suggest 9:24	T 2:1,1 35:14	54:12	33:17,19 34:24	unorthodox 14:1
13:18	take 3:17,18	thinking 42:15	38:25 41:7	use 12:6
suggested 39:17	13:19 16:4	thinks 10:15	43:11 46:9,15	uses 42:23
suggesting 30:18	18:15 29:19	thoroughly 41:21	47:19 50:4 51:9	utterly 16:13,19
53:6	40:19 46:10	thought 15:5	51:11 52:4,13	16:23
suit 5:17	48:5,6,17 52:10	21:17 22:23	52:23 53:8,10	
summary 3:11	53:2,22,24	23:3,3 28:9	54:5,9	V
4:16,18,21 5:2	taken 6:21 13:21	36:11 41:23	troubles 6:24	v 1:5 3:4 10:20
5:3,5,22 6:3,10	20:22	46:16,17 48:14	true 25:3,5 35:5	11:12 18:17
6:15 7:1,20,23	takes 33:13	48:16	39:21 49:5	31:23 39:18
8:1,4,7,21 9:12	talk 10:3	three 21:22	trying 22:20	40:25 41:19
9:18,25 10:9,14	talking 4:2,13	45:14 50:25	36:23	51:7
13:20,22 14:7	10:4,7 17:6	tied 51:17	turn 38:21 44:5	verdict 11:15
15:9,13,18,21	19:21 47:2,3	time 4:13 25:12	53:16	12:15,16 26:19
16:17 17:25	talks 10:1 17:5	times 45:14	turns 23:22 54:8	26:23 34:25
18:8,14 19:10	Tenth 11:12,16	told 14:8 31:6	two 4:6 10:13	38:24 43:15
19:25 21:1,4,5	terms 29:20	33:17	22:13 29:12	49:4 52:5
21:8,13,13 22:9	testified 6:18	touching 32:4	34:6 36:2,5,10	verdict's 25:10
22:10 23:8,10	testimony 8:2	tough 53:20	39:19	verdict-winner
23:17 25:22	Thank 25:13	transcript 20:12	types 34:6 39:19	38:22
26:1,2,14,17	50:23,24 51:3	20:16	typically 5:6	version 35:7
27:5,6,11,18	54:19	treated 44:12	18:16	videotape 16:13
27:22,25 32:9	thing 42:9 44:10	treating 31:20	U	view 49:16
34:24 37:19	51:4	49:6	uncontroverted	viewing 27:14
45:9 48:5,11,15	things 10:13	treatise 42:15	31:21	violate 36:7
49:6 51:5,9,13	22:14 30:19	treatises 22:10	understand 3:25	violated 6:18
	37:15 42:5			20:9

violation 31:21 34:10 36:14 37:8 violent 6:20 20:13 Virginia 10:20 vis 37:9,9 38:7,7	26:11 27:12 words 18:9 26:15 work 40:1 42:3 43:2,3,5 worst 41:6,7 wouldn't 6:5 29:24 38:9 44:19 wrong 21:2 27:4 28:13 39:13 42:7 47:20 wrote 47:7	<hr/> 5 <hr/> 5 34:5 50 11:2 25:8,9 34:13,21 41:24 50(a) 8:23 12:11 12:16 31:4,7 32:3,5 34:1,2,7 34:13,17,18 35:10,11,18,21 41:25 42:6,9,16 42:23,25 43:9 43:25 50(a)-50(b) 12:15 50(b) 7:16 8:10 8:14 9:11 10:18 11:24 12:11 13:12 15:25 16:19,24 28:15 30:1,13,15,21 31:6 32:19 33:20 34:3,13 34:17,19,21 35:11,19,19 40:24,24 41:12 41:13 42:2 43:1 43:25 44:1,3,5 44:12,21 45:1,4 45:11 46:2 49:9 50:5,13 51 2:10 56 34:20		
<hr/> W <hr/> wait 5:4 11:15 52:5 53:9 waived 7:15 8:10 11:25 12:2 13:13 waiver 12:4 want 29:19 50:16 52:8,11,17 53:9 wants 28:21 warrant 34:22 warranted 33:24 Washington 1:8 wasn't 8:9,10 9:2 11:25 33:10 35:22 42:2 46:17 48:9 way 15:8 17:25 18:1 22:17 39:25 44:12 49:19 52:19 ways 44:4 weighed 10:18 well-equipped 50:8 went 14:22 16:14 31:8 47:25 West 10:20 we're 45:10 53:9 We've 51:19 whatsoever 6:12 8:22 whichever 52:19 Williams 11:12 wish 53:4 witnesses 14:23 word 12:6,17	<hr/> X <hr/> x 1:2,7 <hr/> Y <hr/> yeah 51:8 year 34:16 years 5:17 York 40:25 <hr/> 0 <hr/> 09-737 1:5 3:4 <hr/> 1 <hr/> 1 1:9 10 11:14 10:03 1:13 3:2 11:04 54:21 1947 10:20 52:3 <hr/> 2 <hr/> 2a 26:25 2(a) 25:25 20 5:17 45:4 2010 1:9 242 20:12 25 2:7 <hr/> 3 <hr/> 3 2:4 30 48:18 <hr/> 4 <hr/> 4 12:22,23 34:5	<hr/> 7 <hr/> 7a 26:22 49:2 <hr/> 8 <hr/> 84 37:13		